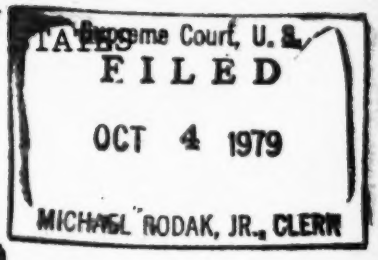
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979




NO. 79-550

PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al.,

Petitioners,

vs.

PERALTA COMMUNITY COLLEGE DISTRICT, et al.,

Respondents

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in this case on May 25, 1979.

## OPINIONS BELOW

The opinion of the Supreme Court of California, reversing the Superior Court for the County of Alameda, is reported at 24 Cal.3d 369, 155 Cal.Rptr. 679, and 595 P.2d 105. The opinion is set forth in the Appendix, infra, at p. 2.

The April 25, 1977 opinion of the Court of Appeal of the State of California, which is unreported, is set forth in the Appendix, infra, at p. 40.

The July 25, 1975 Judgment of the Superior Court is unreported. It appears in the Appendix, infra, at p. 62.

The Superior Court's July 25, 1975 Order for the Issuance of a Peremptory Writ of Mandate is unreported. It is set forth in the Appendix, infra, at p. 65.

The Superior Court's July 25, 1975 Statement of Findings of Fact and Conclusions of Law is unreported. It is set forth in the Appendix, infra, at p.67.

## JURISDICTION

The judgment of the Supreme Court of the State of California was entered on May 25, 1979, and the Order of that Court denying Petitioners' timely request for a rehearing was filed on July 6, 1979. (Appendix, infra, at p. 1.)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

1. Should a state statutory classification which determines whether some but not all state college teachers have access to fundamental due process rights be subject to a minimum rationality standard of review or to a more exacting level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment?

2. Is a classification which prohibits local community college districts from according tenure or other fundamental due process rights to "part-time" teachers, and which permits the districts to pay them at a less-than pro rata rate for their teaching, a classification which bears even a minimally rational relationship to any legitimate state end?

3. Is such a state drawn distinction between part-time and full-time teachers substantially related to any important state goal?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

> Section 1 . . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

California Education Code (Reorganized): Section 87482 (Previously Section 13337.5.)

Notwithstanding the provisions of Section 87480, the governing board of a community college district may employ as an instructor in grade 13 or 14, for a complete school year but not less than a complete semester or quarter during a school year, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificate employees for grades 13 and 14 during a particular semester or quarter because of the higher enrollment of students in those grades during that semester or quarter as compared to the other semester or quarter in the academic year, or because a certificated employee has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

Such employment may be pursuant to contract fixing a salary for the entire semester or quarter.

No person shall be so employed by any one district for more than two semesters or quarters within any period of three consecutive years.

> Notwithstanding any other provision to the contrary, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under the provisions of Section 87604.

Other state statutory provisions that are involved are included in the Appendix, infra, at p. 79, et seq.

## STATEMENT OF THE CASE

The individual petitioners before this Court are teachers initially hired after 1967 by the Peralta Community College District, a local governmental unit which operates five community colleges in Alameda County, California pursuant to an elaborate body of California statutes which determine the structure, program, employment requirements, and general governance of such districts.

Most of the individual petitioners had worked for the district for more than three years at the time the suit was filed in 1974, and some for as long as five years. The character of their classroom responsibilities and their working conditions were generally the same as those of other teachers in the district. Yet petitioners-- and the class of which they are members--are statutorily barred from ever attaining tenured status as community college teachers, regardless of how effective and energetic their teaching performance, and regardless of how impressive and relevant their credentials. And further, petitioners are paid far less per hour of classroom teaching than are the majority of Peralta Community College teachers.

What is the difference between petitioners and their fellow teachers? Simply that petitioners are defined by statute as part-time, not full-time credentialed community college teachers.

The California Education Code creates a hierarchy of teacher statuses. Tenured teachers (also referred to as "permanent" or "regular" teachers) cannot be dismissed without notice and a hearing, and the grounds and procedures for dismissal are carefully set down. Probationary (or "contract") teachers enjoy similar, but somewhat less elaborate rights. At the nadir of the classification scheme lie the "temporary" teachers, who are entirely without statutory due process rights. See trial court's sixth and seventh findings of fact, Findings of Fact and Conclusions of Law, Appendix, infra, at 69; California Education Code (Reorganized), §§87730-87746.

Since it was the goal of the statutory tenure system to protect the expectations of teachers with positions of a settled and continuing nature, and to prevent arbitrary dismissals of these employees, Balen v. Peralta Junior College District, 11 Cal.3d 821, 826, 114 Cal.Rptr. 589, 523 P.2d 629 (1974), state statutes also have regulated the power of the districts to employ substitute and temporary teachers. Ibid.

In 1967, however, an amendment to the 1959 Education Code, section 13337.5, now Education Code (Reorganized) §87482, expanded the power of the community colleges to hire so-called "temporary" employees, and prohibited the districts from classifying part-time teachers as anything but "temporary", regardless of how long the teachers might actually work for a

district.1/ (Section 13337.5's current equivalent in the Reorganized Education Code, §87482, is quoted in full, supra, at p. 4. Section 13337.5 itself is quoted in full in the Appendix, infra, at p. 81-82.)

The teachers who are individual parties to this petition, as well as many others represented by the plaintiff associations, were and have been part-time teachers whom the district routinely dismissed each Spring and rehired thereafter.

In 1974, petitioners brought this suit, charging, inter alia, first that the statutory scheme of which section 13337.5 was a part did not actually require them to be denied tenure and equal pay, and second that if the statute did so provide, it would violate

1/ In its opinion below, the California Supreme Court referred to the relevant statutes by their designation before a 1977 recodification, both for the sake of convenience and because it did not regard any of the changes made in the recodification as germane to the meaning or validity of the relevant section. See Appendix, infra, at p. 2 n. 1 and pp. 14-15 n. 3. We will also refer to these sections by their designation in the 1959 Education Code, except where express reference is made to the Reorganized Education Code. The relationship between the original sections and those currently in force is indicated in the Appendix, infra, at pp. 79 et seq., where all relevant statutes are reproduced.

the Equal Protection clause of the Fourteenth Amendment.

The California Court of Appeals described the trial court proceedings in the following passage adopted by the Supreme Court in its opinion:

> Twelve teachers who have been employed by Peralta Community College District (supported by plaintiff federation of which they are members) sought writ of mandate to compel the district and its governing board to grant them tenured status and to compensate them at a certain rate of pay. The trial court granted the writ to classify some of the teachers as permanent and others as contract employees, but denied the petition as it relates to pay. The district appeals from that portion of the judgment which has to do with classification and the teachers cross-appeal from the part which concerns compensation.

Appendix, infra, at p. 4.

Although the trial court upheld petitioners' claims in part, it expressly rejected petitioners' Equal Protection argument, Appendix, infra, at pp. 71, 77, relying instead on a statutory interpretation which the California appellate courts were to reject.

In accordance with another California Supreme Court case involving the same statute, as well as the same defendant (then known by a slightly different

name), Balen v. Peralta Junior College District, 11 Cal.3d 821, 114 Cal.Rptr. 589, 523 P.2d 629 (1974), the California Supreme Court held in its opinion below that those petitioners who had been hired before the 1967 amendment had already attained non-temporary status, and therefore that the statute--which the California Supreme Court had concluded in Balen was not intended to be retroactive--did not alter this. Affirming the Court of Appeal's decision, the Court reversed that part of the trial court's decision that ordered the district to classify as tenured or probationary the part-time teachers employed after November 8, 1967, the effective date of the statute.2/ Appendix, infra, at pp.25, 60.

2/ Section 13337.5 was interpreted by the California Supreme Court as imposing only two restrictions on part-time teacher classification. The first, that the teacher "'shall be classified as a temporary employee'" was construed by the California Court to "apply only to initial classification and not to preclude an otherwise authorized subsequent change from temporary status." Appendix, infra, at p. 14 (original emphasis). The second limitation, that the part-time employee not be classified as probationary "'under the provisions of Section 13446'" eliminated only one possible alternate basis for subsequent reclassification.

However, the Court went on to examine every other possible statute which might authorize subsequent reclassification of a part-time teacher

Neither the California Court of Appeal nor the Supreme Court of California adverted to the constitutional claim in their opinions. But petitioners--acting in accord with California law--have preserved the issue on appeal by urging their Equal Protection claim in their brief before the California Court of Appeal.

Petitioners pointed out in that brief that "school districts . . . are proscribed by the State and Federal Constitutions from arbitrary, invidious or irrational discrimination." Petitioners went on to argue:

> The test for determining the validity of a statute under state law is substantially the same as under the equal protection clause of the Federal Constitution. The test is whether the discrimination bears any "reasonable relation to a proper legislative objective." ... Stated another way, neither the Fourteenth Amendment nor the State Constitution requires everyone to be treated alike, but creating classes or groups and treating them differently must be based on rational distinctions...
>
> The District's singling out part-time persons for inferior treatment in terms of pay, classifications, employment security and other terms

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2/ (continued) from page
Initially classified as temporary pursuant to section 13337.5, only to conclude "we find no such statute." Appendix, infra, at pp.14-15.

> and conditions of employment operates to defeat [the] legislative purpose and is therefore irrational.

Opening Brief of Cross-Appellants and Reply Brief of Respondents (Court of Appeal of the State of California, First Appellate District, Division Three) at pp.36-37.

In voting to give effect to the fourth paragraph of Education Code §13337.5, the California Supreme Court necessarily rejected petitioners' constitutional challenge to the section.

## REASONS FOR GRANTING THE WRIT

### I. WHERE THE CLASSIFICATION AT ISSUE INVOLVES NOT MERELY ECONOMIC INTERESTS, BUT ACCESS TO DUE PROCESS RIGHTS, CLOSELY RELATED TO IMPORTANT FIRST AMENDMENT INTERESTS, THIS COURT SHOULD DETERMINE WHETHER A LEVEL OF SCRUTINY MORE EXACTING THAN "MINIMUM RATIONALITY" IS WARRANTED TO PROTECT THOSE INTERESTS.

The plight of part-time teachers who are subject to perpetual "temporary" classification presents important constitutional problems relating to the tenure of college teachers, questions which this Court has never before considered in a context involving the nexus of the Equal Protection Clause, the Due Process Clause and the First Amendment.

This Court has previously ruled on tenure issues when they have arisen out of dismissals or refusals to rehire publically employed teachers. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); see also Keyishian v. Board of Regents, 385 U.S. 589 (1967) (striking scheme which allowed dismissal of "subversive" teachers).

Here, on the other hand, petitioners allege no express, direct violation of the Due Process Clause or of the First Amendment because they have not

in fact had their employment terminated. But the exercise of First Amendment rights in the classroom may be no less threatened by a perpetual, if hazy, shadow over the careers of the teachers than by an occasional and flagrant act of political retribution.

This Court ought to consider whether a classification which permits some, but not all, teachers to be subjected to the possibility of arbitrary or retaliatory dismissal accords with the Equal Protection Clause of the Fourteenth Amendment, and ought to consider the standard of review which is appropriate where such a combination of constitutional values is at stake.

All "temporary" employees, classified under section 13337.5, are not, of course, entitled to the many procedural safeguards which may be imposed by the Fourteenth Amendment. Many of them are, in fact, genuine temporaries, with no settled and reasonable expectations of continuity of employment. But a large percentage of those so classified under this statute probably do or should have such constitutionally protected expectations. Perry v. Sinderman, supra, 408 U.S. 593, 601-02; Johnson v. Fraley, 470 F.2d 179, 181 (4th Cir. 1972)("continuous employment over a significant period of time...can amount to the equivalent of tenure"; therefore, failure to accord due process "could rise to 14th Amendment magnitude").

Some of the individual petitioners who originated this suit have been

nominally terminated and then "rehired" for six, eight, even ten consecutive years. "Temporary" community college teachers with such long-term employment histories are not at all unusual. For, as the District conceded in the Balen case, supra, 11 Cal.3d at 830, it has been the policy of the District to make such routine "terminations" with the actual expectation that the employment of the particular part-time teachers would be continued. The results of this policy have been clear: Evidence at the trial established that one-fourth of the "temporaries" who are part-time teachers continue to serve after four years. Plaintiff's Trial Exhibit "1", Certified Staffing Analysis (1973).

Thus, the category of "temporary" part-time teachers has included within it two groups. First, there are those whom we might call "true temporaries"--those whom the districts have only recently hired and whose employment the districts have no current intent to continue beyond a semester or two. (This is either because these teachers are filling a specific need which the district knows will be temporary or because the district has not had an opportunity to assess the performance of the teachers.). The second group consists of those teachers with respect to whom the districts have fairly settled intentions, and who fill ongoing needs of the districts.

The district may well have a constitutional duty under the Due Process Clause of the Fourteenth Amendment to

accord notice and hearing to those employees before terminating them. This is not directly at issue here, since the District -- which does apparently value the services of petitioners and does, in fact, regard them as permanent (if second class) members of the educational community -- has in fact continued to "rehire" petitioners.

But the fact that the District may have a constitutional duty to extend to petitioners at least some of the rights which it furnishes to all full-time teachers with similar experience suggests that these rights are of more constitutional significance than the rights and interests affected by ordinary economic regulations. It follows that a legislative classification which permits local governmental entities to permanently deny an extensive set of statutory rights to certain teachers ought to be scrutinized for more than a merely "rational" relationship to some conceivable governmental purpose.

The point is underlined by the fact that we are dealing here with teachers. The due process and tenure rights of teachers serve not only to prevent personal animus and administrative arbitrariness from interfering with their careers, but also to promote academic freedom, a vital First Amendment interest of teachers, students, and society at large.

This Court has emphasized the

point:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Keyishian v. Board of Regents of New York, supra, 385 U.S. 589, 603. See Developments in the Law, Academic Freedom, 81 Harv.L.Rev. 1045, 1048 (1968)(tenure is "the principal procedural device protecting academic freedom").

Whether the First Amendment of its own force would require some provisions for tenurial protection for long-term part-time college teachers is a nice question which need not be examined here. At a minimum the strength of this interest requires that a classification which threatens the security necessary for full, open and fearless academic inquiry must be subjected to more than minimal scrutiny.

The interests of more than a handful of individuals are involved in the resolution of this question. In California alone some 27,000 part-time teachers work in community colleges,

nearly twice the number of full-time community college teachers.[3] Shall their students face muted voices at the head of the class?

In a different equal protection context, where this Court held particularly sensitive values to be at stake, an intermediate standard of review has been applied -- requiring the challenged classification to "serve important governmental objectives and [to] be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976)(gender classifications); Califano v. Webster, 430 U.S. 313, 316-17 (1977)(same). In the instant case as well, excessive deference to imagined legislative purposes is unwarranted. See generally, Gunther, The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a

3/ The actual statistics, 27,532 part-time community college positions, as contrasted with 14,273 full-time teachers in 1976, are reported in Board Member Gonzales' opinion in Los Rios Community College District v. Los Rios Teachers' Association et al, California Educational Employment Relations Board Decision No. 18 (Case No. S-R-438 June 9, 1977) at p. 40. This decision, in its entirety, is attached as Exhibit "A" of the Brief of Amicus Curiae Community College Counsil of the California Federation of Teachers, to the Supreme Court of the State of California, and is part of the record in this case.

Changing Court: A Model for the Newer Equal Protection, 86 Harv.L.Rev. 1 (1972).

This Court should grant the Petition to decide this important question of the proper equal protection standard to be applied in circumstances like those in the instant case.

## II. THIS COURT SHOULD DETERMINE WHETHER A CLASSIFICATION WHICH REQUIRES COMMUNITY COLLEGE DISTRICTS TO DENY TENURE AND OTHER DUE PROCESS RIGHTS TO ALL PART-TIME TEACHERS, REGARDLESS OF THE LENGTH OF SERVICE, COMPETENCE AND ALL OTHER FACTORS, IS ARBITRARY, IRRATIONAL AND UNRELATED TO ANY LEGITIMATE STATE GOAL.

The gulf between the treatment accorded tenured or probationary teachers, on the one hand, and that accorded "temporaries", on the other, by the California statutory scheme is wide and deep. For example, West's California Education Code (Reorganized) contains fully 20 pages of statutes dealing with "Instructor Dismissal Procedures", Sections 87730 to 87746. Section 87740, reproduced in the Appendix, infra, at pp. 86-90, entitled "Cause, notice, and right to hearing required for dismissal of probationary employee," is representative of the care with which the state legislature has chosen to protect even teachers who have not yet achieved the tenured status.

The place of "temporary" teachers in this legislative scheme is presented in a single statute, California Education Code (Reorganized) Section 87742, which provides in full:

> Governing boards of community college districts may dismiss

temporary employees at any time at the pleasure of the Board.

On its face, such a differentiation of statuses may not be absurd, given the initial purposes of the legislature in establishing this system. These purposes were authoritatively stated in the 1974 California Supreme Court case, Balen v. Peralta Junior College District, supra, 11 Cal.3d 821:

> The essence of the statutory classification system is that continuity of service restricts the power to terminate employment which the institution's governing body would normally possess. Thus, the Legislature has prevented the arbitrary dismissal of employees with positions of a settled and continuing nature, i.e., permanent and probationary teachers, by requiring notice and hearing before termination. Substitute and temporary teachers, on the other hand, fill the short range needs of a school district, and may be summarily released absent an infringement of constitutional or contractual rights. Because the substitute and temporary classifications are not guaranteed procedural due process by statute, they are narrowly defined by the Legislature, and should be strictly interpreted.
>
> 11 Cal.3d at 826 (citations and footnote omitted).

Moreover, recognizing that teachers originally hired to fill a short range need sometimes came to stay on longer, the legislature made provision for protecting the settled expectations of these employees as well, by requiring their status to be transformed from temporary to probationary status (or "contract" status, as it is also known in the Education Code). See section 13337, 1959 Education Code, Appendix, infra, pp. 79-81. For, as the Court also stated in Balen, the purposes of the probationary status are to "allow[] the new teacher sufficient time to gain additional professional expertise, and [to] provide[] the district with ample opportunity to evaluate the instructor's ability before recommending a tenured position." 11 Cal.3d at 829. And once a "temporary" stayed on any length of time, probationary status was proper for then it became practical for these purposes to be met and appropriate, as well, to protect the employee from arbitrary action.

Thus, the system initially made sense because the statutory due process rights attached to all employees with "positions of a settled and continuing nature," and only true temporaries and substitutes were excluded from such rights.

But the symmetry and sense of this scheme were disrupted when the legislature amended the Education Code in 1967 to allow districts to hire long-term "temporaries" -- a contradiction in terms which reflects the irrationality

of the code section which wrought this result -- and to prohibit the districts ever from transforming some of these temporaries, the part-timers, to probationary or tenured status.

What was the basis for this decision? In its opinion below, the California Supreme Court looked to the legislative history of the section in order to confirm its view that the fourth paragraph of section 13337.5 did indeed prohibit part-time teachers from ever attaining job security.

The California Court noted that the Section, as originally introduced in the state legislature, consisted of only the first three paragraphs.

> The Senate referred the bill successively to its committees on local government and education and adopted amendments proposed by the local government committee. The principal amendment added the present provisions of the fourth paragraph but applied them to "any person who is employed for 15 hours or less per week to teach adult or junior college classes." (See 1 Sen. J. (1967 Reg. Sess.) pp. 333, 369, 833, 863, 887.)
>
> In light of evidence in the present record that 15 teaching hours per week is ordinarily a full-time assignment, that amendment probably would have relegated nearly all newly employed adult and community college teachers to

> temporary status, virtually depriving the original bill of practical meaning. Such an outcome was prevented by an "author's amendment," adopted by the Assembly and concurred in by the Senate, that limited applicability of the fourth paragraph to employees working no more than 60 percent of full-time...
>
> The history thus indicates that the section's fourth paragraph as initially adopted by the Senate was at cross-purpose with the first three paragraphs. As modified and finally enacted the fourth paragraph was a compromise between (1) the objective of the authors to impose limits of purpose and duration on the authority to hire temporary community college teachers, and (2) the proposal of the local government committee to place virtually all newly hired community college teachers on temporary status.
>
> Appendix, infra, at pp. 10-11.

This Court has often held that states have considerable latitude in fashioning classifications to deal with social and economic problems, and that they are allowed to attempt a cure on a "one-step-at-a-time" basis. See, e.g., Williamson v. Lee Optical, 348 U.S. 483, 489 (1955); McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969). But see Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (applying "rationality" scrutiny with some bite).

This case offers the Court the opportuntiy to test the limits of this doctrine in a context involving access to due process rights. For, in this case, we are not faced with a reasoned distinction between differing sub-classes, made with an eye toward determining which of them was the neediest; nor the exercise of legislative discretion as to where the remedial process ought to start. Rather, we have here a simple and arbitrary political compromise between those who would have new community college teachers excluded from all tenurial rights, and those who wished to preserve and extend those rights.

Petitioners understand that legislation does not emerge as the result of a neat and clean political process. But surely there are limits on the power of legislators to make classifications based on the conflicting desires of different power centers. Certainly, if the compromise described by the California Supreme Court had taken the form of an amendment which states, "All community college teachers whose names begin with letters from A to M shall be classified as temporaries," this Court would have little difficulty in striking it down.

In light of the legislative goals articulated by the California Supreme Court in Balen, the division actually made by the legislature, between those who teach more, is no less arbitrary and no less irrational. The record makes clear that it is not just the occasional "temporary" who is a long-term employee;

rather, many employees are in this position. And it is the policy of the community college district to integrate such persons into their educational programs on a long-term basis -- albeit at a lower salary and while retaining to itself the right to fire these individuals at will.

Yet each of the goals discussed by the California Supreme Court in Balen is actually thwarted by the treating of part-time teachers as second-class employees. Certainly an employee who teaches for three, five, even ten years at the same college has the "continuity of service" which "create[s] the necessary expectation of employment which the Legislature has sought to protect from arbitrary dismissal." 11 Cal.3d at 827. And such teachers have had sufficient time to gain additional professional expertise, and have given the districts ample opportunity to evaluate their ability. As the California Supreme Court also pointed out in Balen, "[a] part-time instructor . . . generally serves under conditions comparable to those of his full-time counterpart . . . ." 11 Cal.3d at 829.

Ironically, the State of California -- speaking through the California Unemployment Insurance Appeals Board -- itself has pierced the charade which another of the State's instrumentalities, the community college district, has insisted on in this case. Where the district insists, each year, that the part-time teachers are temporaries,

without reasonable expectations, to whom it owes nothing, the Unemployment Insurance Board has refused to pay unemployment compensation to these teachers for the summers following their annual "terminations", precisely because they have a "reasonable assurance" of resuming work. In the Matter of Terrence Lamb, Napa Community College District and Employment Development Department, California Unemployment Insurance Appeals Board, No. 78-7212 (1978). Appendix at p. 91.

There is a common, consistent thread that runs through the seemingly contradictory position of the state's two agents, the community college district and the Unemployment Compensation Board. That common thread is the desire to save money at the expense of the part-time teachers. For by forcing the long-term part-time teachers into the procrustean bed of "temporary" status, the district saves money, since it pays them so much less per classroom hour. See Findings of Fact and Conclusions of Law, Appendix, infra, at p. 75.

Petitioners submit that while the goal of saving money is a worthy one, the State or its instrumentalities may not forget the Fourteenth Amendment in their quest to save money. The classification which enables the district to pay some less must not be arbitrary or irrational. Memorial Hospital v. Maricopa County, 415 U.S.250, 263 (1974) ("a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens").

The only other interest asserted by the district in distinguishing between long-term part-time and full-time teachers is its purported need for flexibility. "The District finds it necessary," the trial court stated, "to change course offerings constantly in response to such factors as the general economy." Findings of Fact and Conclusions of Law, Appendix, infra, at p. 76.

Here again the question -- not clearly resolved by this Court's opinions -- is just how much in the way of a "fit" between ends and means is required? It appears reasonable, in distributing the burden of any actual need for such flexibility, to disadvantage temporary teachers, or those with the least seniority, rather than "permanent" teachers. But the State does not make the reality of its classification conform to the plausibility of these terms by waving a magic wand over its long-term part-time employees and calling them "temporary".

Notably, in the instant case, we are not faced with a reasonable effort of the State to meet its purported need for flexibility in course offerings. The system required by the fourth paragraph of Section 13337.5 is a model of inflexibility, since it prevents part-time teachers from ever attaining permanent status, regardless of how long they go on teaching and regardless of whether they teach courses for which demand is constant. For there is no necessary or even plausible reason to believe that all part-time teachers teach courses for which demand is var-

iable, requiring flexibility in staffing. The facts adduced in the trial court's ninth finding of fact are deceptive and ultimately uninformative in this regard. The court, treating the group of "temporaries" as a whole, pointed out certain differences between the so-called temporaries as a group and the tenured and probationary employees as a group. It is precisely petitioners point, however, that the class of part-time teachers includes a substantial proportion who are long-term employees. These teachers are misclassified when they are lumped together with the true temporaries, who doubtless do have different characteristics from the tenured teachers. Since it is precisely this sticking together of those who are fundamentally different that is at stake, the district may not rightly merge the groups for proving the reasonableness of its distinction between the merged, mismatched group and another classification.

It follows that the State's division per se between part-time and full-time has nothing to do with the line between constant and variable demand courses. The fact that 26 percent of part-time teachers remain employed by the district for more than four years suggests that any coincidental connection between the two categories is very loose indeed.

This case also presents the question whether the minimum rationality or substantial relationship tests are met by a classification with no logical relationship to the desired end and

whose actual correlation with the desired end is very weak. The issue is particularly pointed when the alternative -- a division based on length of service to the district -- would probably satisfy all of the relevant legislative ends.

The circumstances of this case thus make it an especially suitable one for determining the limitations to be imposed on state-drawn classifications even under the non-stringent rational basis standard of equal protection law.

## CONCLUSION

For all the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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October 3, 1979

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8. In the Matter of: Terrence Lamb, Napa Community College District and Employment Development Department . . . 91

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 6 1979

*I have this day filed Order*

REHEARING DENIED

*In re:* S.F. *No.* 23648

Peralta Federation of Teachers

*vs.*

Peralta Community College

*Respectfully,*

G. E. BISHEL
*Clerk*

68933-877 11-78 4M OSP

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

| | |
|---|---|
| PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al., Plaintiffs and Appellants, vs. PERALTA COMMUNITY COLLEGE DISTRICT, et al., Defendants and Appellants. | S.F. 23648<br>Super. Ct. No. 449204-3 |

The principal question in this case is whether former section 13337.5 of the Education Code withholds tenure rights from community college teachers hired over a period of years to serve less than 60 percent of full time. 1/

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1/ Unless otherwise indicated, all section references are to the Education Code of 1959 as it read just before its recodification effective April 30, 1977.

Section 13337.5 provides: "Notwithstanding the provisions of Section 13337, the governing board of a school district

(Fn. Cont.)

I. Did teachers hired before November 8, 1967, acquire permanent status?

Section 13337.5 became law on November 8, 1967. It does not affect teachers hired before then. (Balen v. Peralta Junior College Dist. (1974) 11 Cal.3d 821.) With respect to the facts here and rights of pre-1967 teachers the Court of Appeal opinion in this case,

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maintaining a community college may employ as a teacher in grade 13 or grade 14, for a complete school year but no less than a complete semester or quarter during a school year, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees for grades 13 and 14 during a particular semester or quarter because of the higher enrollment of students in those grades during that semester or quarter as compared to the other semester or quarter in the academic year, or because a certificated employee has been granted leave for a semester, quarter, or year, or is experiencing long term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

"Such employment may be pursuant to contract fixing a salary for the entire semester or quarter.

"No person shall be so employed by any one district for more than two semesters or quarters within any period of three consecutive years. (Fn. Cont.)

written by Justice Devine and concurred in by Justices Draper and Scott, reads as follows (and we adopt these paragraphs as part of our opinion):

"Twelve teachers who have been employed by Peralta Community College District (supported by plaintiff federation of which they are members) sought writ of mandate to compel the district and its governing board to grant them tenured status and to compensate them at a certain rate of pay. The trial court granted the writ to classify some of the teachers as permanent and others as contract employees, but denied the petition as it relates to pay. The district appeals from that portion of the judgment which has to do with classification and the teachers cross-appeal from the part which concerns compensation.

"1. Preliminary Explanation

"The district employs between 1200 and 1300 instructors at its five campuses. There are three classes of instructors: regular ('permanent' or 'tenured'), contract ('probationary') and temporary. [Fn. omitted.] Some regular and contract

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"Notwithstanding any other provision to the contrary, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee, and shall not become a probationary employee under the provisions of Section 13446."

teachers are employed part time, and these are paid a salary prorated to the salary of a full-time teacher. Temporary teachers are paid a flat hourly rate which is less than the rate which the salaried employee receives; they do not receive certain fringe benefits which are accorded those of the two higher classes; they may be dismissed without notice or hearing.

"Plaintiffs all work less than 60 percent of full time. They receive a written letter of notification from the district regarding their employment for the coming academic year. The letter states the instructor's potential assignment and specifies that his position is a temporary one. They are hired from quarter to quarter or from semester to semester, as the case may be. They are uniformly dismissed at the end of each year.

"Because different questions of law are applicable to teachers hired at different times, it is necessary to divide the twelve individual plaintiffs into two categories and to consider each category separately. (This is not a class action.)

"2. Teachers Employed Before November 8, 1967

"Three of the plaintiffs have been employed year after year, but as temporary employees, annually discharged and rehired, commencing at dates earlier than the statutory changes. . . of November 8, 1967. The trial judge ordered that the three plaintiffs be classified as part-time regular employees.

"In order to become a regular

(permanent) employee, one must first become a contract (probationary) employee. Prior to September 1, 1972, three years' service as a contract (probationary) employee was needed as a basis for permanent (tenured) status.

"Two questions, then, are before us at this point: (1) Did these three plaintiffs become contract (probationary) employees? and (2) did they attain tenure as regular employees? The district argues that the teachers may rightly claim neither status . . . . [¶] [W]e deem the first question to have been answered by the decision in Balen v. Peralta Junior College Dist., 11 Cal.3d 821 [114 Cal.Rptr. 589, 523 P.2d 629]. Balen had been employed for four successive years since 1965 by the district as a temporary instructor. Then he was informed that his contract would not be renewed. It was held that under Education Code section 13334, which provides that 'Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees,' Balen met the statutory prerequisites for probationary employment, although he was a part-time instructor. (At p. 829.) Plaintiffs meet the same prerequisites. Section 13337.5 of the Education Code, enacted in 1967 . . . was held to be nonretroactive; it could not divest plaintiff of his previously acquired status. [Fn. omitted.] The three pre-1967 employees became contract (probationary) employees prior to the enactment of section 13337.5.

"The second question is whether they acquired regular (permanent) status. Pursuant to section 13304 each such employee would be entitled to regular status if he had served three complete consecutive school years. A 'complete school year' was defined for community college employees as '75 percent of the number of hours considered as a full-time assignment for permanent employees.' (§ 13328.5.) It was found by the trial court that none of the above named employees met the 75 percent requirement. In 1972, major revisions in the Education Code were made with respect to community college instructors (the 'Rodda Act'). The teachers contend that by virtue of the new provisions, the 75 percent rule set forth in section 13328.5 has no further application.

"Section 13346.25, effective in 1972, provides that if a contract (probationary) employee is employed under his second consecutive contract, the governing board has two options: to employ him as a regular employee for all subsequent academic years or not to employ him as a regular employee. But in the case of a contract (probationary) employee, the district's right to do this is limited by the requirement of section 13443 that notice of nonemployment be given with the reasons stated. It would not be sufficient reason, under Balen, to declare that the employment had been temporary only, no matter what the teacher's contract might say (Campbell v. Graham-Armstrong, 9 Cal.3d 482, 486-487 [107 Cal.Rptr. 777, 509 P.2d 689]), because these teachers had attained contract status before 13337.5 was enacted. In the case of contract (probationary) teachers,

the decision not to reemploy must be based on 'thoughtful, deliberate, and individual consideration.' (Balen v. Peralta Junior College Dist., supra, [11 Cal.3d at p. 830, fn. 10.) These teachers were simply regarded as 'temporaries' and were not afforded the prescribed decision.

"But was it still required that a part-time pre-1967 contract employee serve 75 percent of the hours under section 13328.5 in order to qualify for reemployment under the new (1972) section 13346.25 as a regular part-time employee in the absence of a decision of the board, supported by a valid reason, not to reemploy? It is concluded that the 75 percent requirement of 13328.5 does not apply to these pre-1967 employees; that the provisions of the later section 13346.25 take precedence. We agree with an opinion of the Attorney General to the effect that, although section 13328.5 remains on the books, it has been rendered meaningless, at least insofar as the acquisition of tenure is concerned. (58 Ops.Cal.Atty.Gen. 703 (1975).) The pre-1967 teachers must be classified as part-time regular employees as of July 1, 1974 (this date is in accordance with section 25490.20, subd. (b))."

II. Did the temporary status of teachers hired after November 8, 1967, require compliance with the first three paragraphs of section 13337.5?

Plaintiffs who were employed after November 8, 1967, when section 13337.5 took effect, contend their status is unaffected by that section's fourth paragraph

because their employment did not meet the conditions of the first three paragraphs. The first paragraph provides that a district "may classify" community college ("grade 13 and 14") teachers as temporary if they were employed to fill needs arising from increased enrollment or from absences of teachers on leave or ill. The third paragraph states, "No person shall be so employed . . . for more than two semesters or quarters within any period of three consecutive years." (See text in fn. 1, ante.) Plaintiffs' employment admittedly complied with none of those conditions. Justification for their temporary status thus depends on whether the section's fourth paragraph applies despite noncompliance with paragraphs one and three.

The district contends that the fourth paragraph's independent applicability is clear from section 13337.5's language. Words in the fourth paragraph support the contention. Unlike the first three paragraphs, the fourth paragraph (1) states it is operative "[n]otwithstanding any other provision to the contrary," (2) applies not only to community college instruction but also to adult classes at lower grade levels, (3) applies only to employees assigned to teach not over 60 percent of full time, and (4) makes the classification as a temporary employee, and the limitation on becoming probationary, mandatory rather than permissive.

In contrast to the fourth paragraph's expressions of self-containment and command, the words of the first three paragraphs are permissive. They impose no conditions on the fourth. Thus the

section's first sentence simply permits temporary employment of community college teachers, and each succeeding sentence of the first three paragraphs contains words that limit its operation to the previously described employment: "employment of such persons"; "[s]uch employment"; "[n]o person shall be so employed."

Section 13337.5's legislative history seems to confirm the independent operation of the fourth paragraph. The section was first enacted in 1967, in substantially its present form, as Senate Bill No. 316. As introduced on February 8, 1967, the bill contained the substance of only the present first three paragraphs. The Senate referred the bill successively to its committees on local government and education and adopted amendments proposed by the local government committee. The principal amendment added the present provisions of the fourth paragraph but applied them to "any person who is employed for 15 hours or less per week to teach adult or junior college classes." (See 1 Sen. J. (1967 Reg. Sess.) pp. 333, 369, 833, 863, 887.)

In light of evidence in the present record that 15 teaching hours per week is ordinarily a full-time assignment, that amendment probably would have relegated nearly all newly employed adult and community college teachers to temporary status, virtually depriving the original bill of practical meaning. Such an outcome was prevented by an "author's amendment," adopted by the Assembly and concurred in by the Sentate, that limited applicability of the fourth paragraph to employees working no more than 60 percent

of full time. (See 2 Assem. J. (1967 Reg. Sess.) 3006, (3 Assem. J. (1967 Reg. Sess.) 4422; 3 Sen. J. (1967 Reg. Sess.) 3141, 3296. Neither author of the original bill belonged to the Senate's local government committee, which had proposed the vitiating amendment. One of them, Senator Grunsky, was a member of the Senate's education committee. (See Sen. Final History (1967) pp. 505, 507-508.)

The history thus indicates that the section's fourth paragraph as initially adopted by the Senate was at cross-purpose with the first three paragraphs. As modified and finally enacted the fourth paragraph was a compromise between (1) the objective of the authors to impose limits of purpose and duration on the authority to hire temporary community college teachers, and (2) the proposal of the local government committee to place virtually all newly hired community college teachers on temporary status.

Plaintiffs have submitted a copy of a letter dated June 26, 1967, from Senator Grunsky to the Governor, who then had the bill before him for signature. In urging the Governor to sign, Senator Grunsky said that it "allows the district to use hourly teachers without having them become probationary employees no matter how many months they are employed, provided such persons teach less than sixty percent of the hours considered a full time assignment for permanent employees, and provided they do not employ such person more than two semesters or quarters during any three year period."

Those words do indicate a representation to the Governor by a coauthor of the bill that a district's authority under the fourth paragraph to hire temporary teachers for 60 percent or less of full time was subject to the third paragraph's limitation of no more than two semesters or quarters of temporary employment in any three-year period. The representation is offset, however, not only by the words of the bill but also by the Legislative Counsel's digest, which contradicts the Grunsky letter by portraying the fourth paragraph as independently operative.2/ That digest, printed on the bill's first page, was prominently available not only to the Governor but also to all legislators.

Finally, plaintiffs contend that language in Balen v. Peralta Junior

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1/ The digest describes the bill's final version as follows: "Authorizes junior colleges to hire teachers as temporary employees, pursuant to contract, for a semester or quarter of the school year if such additional teachers are needed because of higher enrollment of students during that semester or quarter as compared to other semester or quarter. Limits such employment to a total of two semesters or quarters during any consecutive three-year period.

"Provides that any person employed to teach adult or junior college classes for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties is a temporary, not probationary employee."

College Dist., supra, 11 Cal.3d 821, 829, authoritatively construes the fourth paragraph's limitation of temporary employment to no more than two semesters or quarters within three years. As pointed out above in connection with plaintiffs who were employed before 1967, Balen held that section 13337.5 could not be applied retroactively to divest them of previously acquired status. (11 Cal.3d at pp. 828-829, 830, fn. 9.) The holding of nonretroactivity would not have been necessary if the section by its terms did not purport to impose temporary status on a teacher in Balen's position. Balen taught continuously for four and a half years, never exceeding 40 percent of full time. (11 Cal.3d at pp. 825, 828.) Thus his employment went beyond the two-semester limitation of the third paragraph and could not be rendered temporary by the section unless -- as we now hold -- the fourth paragraph is applicable independently of the first three. Our present holding therefore was implicit in Balen's reaching the issue of nonretroactivity. Coffey v. Governing Bd. of S.F. Community College Dist. (1977) 66 Cal.App. 3d 279, 291-293, and Ferner v. Harris (1975) 45 Cal.App.3d 363, 371-372, are disapproved insofar as they hold to the contrary.

III. Has any statute consistently with section 13337.5 provided for a change from plaintiffs' temporary status?

The fourth paragraph of section 13337.5 imposes two restrictions on giving other than temporary status to persons

employed to teach community college classes only 60 percent of full time: the teacher (1) "shall be classified as a temporary employee," and (2) "shall not become a probationary employee under the provisions of Section 13446." The second restriction would be superfluous if the first were not construed to apply only to initial classification and not to preclude an otherwise authorized subsequent change from temporary status. That interpretation of the first restriction accords with the policy of strictly construing the temporary classification (Balen, supra, 11 Cal.3d at p. 826), and we adopt it here.

The second restriction prohibits the teacher's becoming a probationary employee under section 13446, which states that a "temporary employee who is not dismissed during the first three school months...of the school term for which he was employed...shall be deemed to have been classified as a probationary employee from the time his services as a temporary employee commenced."

That specificationof section 13446 implies noninterference with reclassification under any other statute.3/ Yet we

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3/ The dissenting opinion accurately points out that in new section 87482, successor to section 13337.5 in the 1976 recodification of the Education Code, the reference to section 13446 is replaced by one to section 87604 of the recodification, which simply requires that a community college district "employ each certificated employee as . . . [a] contract

find no such statute. None of the sections pointed to by plaintiffs -- 13334, 13336, 13337, and 13337.3 -- supports plaintiffs' reclassification as other than temporary within the limitations of the fourth paragraph of section 13337.5.

Section 13334, which antedates section 13337.5, provides that "districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees." Those words deal not with reclassification but with initial classification. Thus their application to plaintiffs is precluded by section 13337.5's command that they "shall be classified as . . .temporary. . . ."

Before 1971, section 13336 simply required that teachers be classified as "substitute employees" when employed "to fill positions of regularly employed persons absent from service." Plaintiffs

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employee, regular employee, or temporary employee." (See diss. opn., post, p.___, fn. 7.) That change of reference does not alter the duality of section 13337.5's command that teachers on 60 percent time (1) "shall be classified" as temporary and (2) "shall not become" probationary under a particular provision. Thus, new section 87482 continues to confine the absolute prohibition to initial classification and to refrain from restricting subsequent changes of classification unless under new section 87604.

do not claim substitute status; and in any event section 13336's application to plaintiffs is precluded by section 13337.5's restriction on initial classification.

A 1971 amendment to section 13336 added the following: "Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a position requiring certification qualifications, be classified by the governing board as a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status." Application of those words would not be prohibited by either restriction of section 13337.5's fourth paragraph because they provide not for initial classification but for reclassification under a provision other than section 13346. They apply, however, only to persons "employed for one complete school year as a temporary employee." (Italics added.) Other sections define a complete school year of probationary employment as service for 75 percent of the days in the school year (§ 13328)4/ or 75 percent of the number of hours

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4/ "A probationary employee who, in any one school year, has served for at least 75 percent of the number of days the regular schools of the district in which he is employed are maintained shall be deemed to have served a complete school year. In case of evening schools, 75 percent of the number of days the evening schools of the district are in session shall be deemed a complete school year.

considered a full-time assignment (§ 13328.5). 5/

Those 75 percent requirements must have been intended to apply to the year of temporary employment qualifying (under § 13336) as the equivalent of "one year's employment as a probationary employee for purposes of acquiring permanent status." Plaintiffs do not claim to have met the 75 percent requirements; nor is it apparent how they could be met by anyone employed to teach "for not more than 60 percent of the hours per week considered

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5/ "Notwithstanding Section 13328, a probationary employee employed by a community college district or a community college maintained by a unified or high school district who, in any school year consisting of two semesters or three quarters, has served more than 75 percent of the number of hours considered as a full-time assignment for permanent employees having similar duties in the community colleges of the district in which he is employed, shall be deemed to have served a complete school year."

The section just quoted, enacted in 1967, codified for community colleges a standard of 75 percent of full-time hours that was already implicit in section 13328's standard of 75 percent of school-year days. (Vittal v. Long Beach Unified School Dist. (1970) 8 Cal.App.3d 112, 119-121.) To allow section 13328 to be satisfied regardless of minimum hours (e.g., by four one-hour days per five-day week) could lead to anomalies we do not believe were intended.

a full-time assignment" (§ 1337.5).[6/]

Section 13337's first paragraph provides: "Governing boards of school districts shall classify as temporary employees those persons requiring certification qualifications, other than substitute employees, who are employed to serve from day to day during the first three school months of any school term to teach temporary classes not to exist after the first three school months of any school term or to perform any other duties which do not last longer than the first three school months of any school terms, or to teach in special day and evening classes for adults or in schools of migratory population for not more than four school months of any school term. If the classes or duties continue beyond the first three school months of any school term or four school months for special day and evening classes for adults, or schools for migratory population, the certificated employee, unless a permanent employee, shall be classified as a probationary employee. The school year may be

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6/ Imposition of the 75 percent requirement on the "one complete school year as a temporary employee" prerequisite to probationary status under section 13336 is consistent with our conclusion that the pre-1967 plaintiffs (whose probationary status on 60 percent or less of full time antedated section 13337.5) became regular (permanent) part-time employees under section 13346.25 (which contains no reference to a "complete school year" or to any minimum hours or days that must have been worked.)

divided into not more than two school terms for the purpose of this section." (Italics added.) Plaintiffs fail to qualify for reclassification under that section because there is no showing that the existence of their duties or the classes they were hired to teach was limited to the first three months of the term, or that they were employed to teach special classes for adults or in migratory schools for not more than four months in a term.

Section 13337.3, enacted in 1971, (1) authorizes employment of temporary teachers under conditions that also are stated in the first paragraph of section 13337.5 and were not met by plaintiffs, and (2) provides in the language of section 13336 that a temporary employee "for one complete school year," if reemployed for the following year, shall be classified as probationary and the year of temporary employment shall be deemed probationary. 7/ As already seen, reclassification under this provision,

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7/ Section 13337.3 states: "Notwithstanding the provisions of Sections 13336 and 13337, the governing board of a school district may employ as a teacher, for a complete school year, but not less than one semester during a school year, unless the date of rendering first paid service begins during the second semester and prior to March 15th, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees

as under section 13336, required temporary employment for 75 percent of the days or full time teaching hours of a complete school year (§§ 13328, 13328.5) and so was not available to plaintiffs.

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during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

"Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a vacant position requiring certification qualifications, be classified by the governing board as a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status.

"For purposes of this section" vacant position" means a position in which the employee is qualified to serve and which is not filled by a permanent or probationary employee. It shall not include a position which would be filled by a permanent or probationary employee except for the fact that such employee is on leave."

The final paragraph and the word "vacant" in the second paragraph were added in 1975.

## IV. Salary Claims and Procedural Defenses

All plaintiffs claim additional compensation that would make what they receive for part-time work proportionate to the amounts paid full-time employees as provided by section 13503.1. 8/ The plaintiffs employed after November 8, 1967, however, are not entitled to that section's benefits because of its express exclusion of "any person classified as a temporary employee under Section 13337 and 13337.5" Since section 13337 and section 13337.5 each contains its own provisions for temporary classification, not dependent on those of any other section, we construe section 13503.1's exclusion to apply to employees such as plaintiffs who are classified under section 13337.5 alone.

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8/ Section 13503.1 provides: "Any person employed by a district in a position requiring certification qualifications who serves less than the minimum school-day as defined in Sections 11003 to 11008, inclusive, or 11052 may specifically contract to serve as a part-time employee. In fixing the compensation of part-time employees, governing boards shall provide an amount which bears the same ratio to the amount provided full-time employees as the time actually served by such part-time employees bears to the time actually served by full-time employees of the same grade or assignment. This section shall not apply to any person classified as a temporary employee under Section 13337 and 13337.5, or any person employed as a part-time employee above and beyond his employment as a full-time employee in the same school district."

As to the plaintiffs employed before November 8, 1967, the Court of Appeal correctly resolved their claims of additional compensation and the procedural defenses raised by the district. We therefore adopt the following parts of Justice Devine's opinion covering these matters:

"[Section 13503.1] requires pro rata pay for part-time regular or contract employees. Thus, apart from the defenses of the statute of limitations, laches and failure to seek administrative relief, the three pre-1967 plaintiffs are entitled to prorated wages as back pay. Against this conclusion, the district argues that section 13503.1 applies only to elementary and secondary schools and schools for the handicapped by its reference to sections 11003 to 11008, inclusive, and to 11052. But this reference merely points out the places where a minimum school day is defined. Section 13503.1 refers to '[a]ny person employed by a district.' (Italics added.) Further, the reference to 13337 and 13337.5, in excluding temporary employees classified under these sections, clearly implies that section 13503.1 does embrace community college districts in its positive part, otherwise the specific exclusion would be unnecessary.

"The district contends that the instructors are bound by the terms of their employment contracts. This is so when there is no statutory provision to the contrary. But it is not so in the face of statutory specification. (Campbell v. Graham-Armstrong [1973] 9

Cal.3d 482, 486-487.) In Campbell, the teachers had contracted to teach one session of kindergarten at part-time salary at a rate of pay below the minimum salary set by statute for full-time employees. On the issue of a contractual waiver, it was held that pursuant to section 13338.1, the teachers' contractual agreement did not preclude their entitlement to full-time salary.

"The part-time employee who has attained regular or contract status 'generally serves under conditions comparable to those of his full-time counterpart.' (Balen v. Peralta Junion College Dist., supra, [11 Cal.3d] at p. 829.) The three regular teachers are entitled, under substantive law, section 13503.1, to pro rata pay.

"...Statute of Limitations

"A mandamus proceeding by teachers seeking proper classification and salary is subject to Code of Civil Procedure section 338, subdividion (1), the three-year statute, because it is upon a liability created by statute. (Vittal v. Long Beach Unified Sch. Dist., 8 Cal. App.3d 112 [87 Cal.Rptr. 319]; Ingram v. Board of Education, 36 Cal.App.2d 737, 739 [98 P.2d 527]; Baldwin v. Fresno City etc. School Dist., 125 Cal.App.2d 44, 51 [269 P.2d 942].) The petition was filed on May 2, 1974, so it relates back to May 2, 1971. Those plaintiffs who are declared herein to have temporary status do not have rights that are affected by the statute of limitations. The three pre-1967 employees' status as probationary employees was acquired before May 2, 1971; their right to pro rata compensation

commences July 1, 1971, and not earlier, because of the statute of limitations.

"...Laches

"The trial judge did not make a finding on the subject of laches as related to the three employees who, under our decision, are entitled to probationary status and to pro rata pay. But we decide that, as a matter of law, these employees' rights are not barred by laches, because of the rather bewildering array of statutory changes which confronted them, so that, as was said in Balen: '[I]t is understandably difficult for an individual teacher to define conclusively his status at a particular time.' [11 Cal.3d at] p. 827.) How and when to proceed toward judicial determination was not a simple matter. Indeed, [Balen's] case, which is similar to that of our three pre-1967 employees, filed December 4, 1970, was decided against him in the superior court by summary judgment and this judgment was sustained by the Court of Appeal [in a published opinion] though it was reversed by the Supreme Court June 28, 1974. But these plaintiffs commenced this proceeding even before the Supreme Court's decision. They should not be charged with unreasonable delay, in view of the complexity and duration of the comparable Balen litigation and of the district's uncompromising position (also understandable conduct in the circumstances).

"...Failure to Exhaust Administrative Remedies

"The district argues that no writ of mandate can be issued because the plaintiffs have not exhausted their

administrative remedies.

"Prior to the enactment of the Rodda Act, there was no statutory procedure for an administrative review of an instructor's classification or salary. Accordingly, it was held that no application need be made to the college by the employee for acquisition of his proper status; no affirmative action was required by the governing board. The attainment of the proper classification was automatic. (Vittal v. Long Beach Unified Sch. Dist., supra, [8 Cal.App.3d 112]; Holbrook v. Board of Education [1951] 37 Cal.2d 316, 333-334 [231 P.2d 853]; 43 Cal.Jur.2d, Schools, § 461, p. 847.)

"Since 1972, under the Rodda Act, a second-year contract employee has been entitled to a hearing upon objection to the governing board's decision not to employ him as a regular employee. (§ 13346.32.)

"However, this statutory remedy presupposes that a decision is made by the board not to employ the second-year contract employee as a regular employee. In the case at bar, the district made no such decision with respect to plaintiffs, because the district considered plaintiffs to be temporary employees. Accordingly, plaintiffs received no notice of the board's decision pursuant to section 13346.30.

"Moreover, it has been held that the rule requiring exhaustion of administrative remedies is subject to exception if the petitioner knows what the agency's determination will be. (Ogo Associates v. City of Torrance [1974] 37 Cal.App.3d

830, 834 [112 Cal.Rptr. 761].) In the present case, the board refused to discuss the matter because the issues were in other litigation.

"The district's contention is rejected."

The judgment is reversed with directions to the superior court to issue a writ of mandate ordering defendants to classify those plaintiffs who were employed prior to November 8, 1967, as part-time probationary certificated employees as of July 1, 1971, and as part-time regular certificated employees as of July 1, 1974, and to award them back pay from July 1, 1971, prorated according to their classifications; and to deny the writ as to those plaintiffs who were employed on or after November 8, 1967. Each side will bear its own costs of appeal.

NEWMAN, J.

WE CONCUR:

BIRD, C.J.
TOBRINER, J.
MOSK, J.
MANUEL, J.

CONCURRING AND DISSENTING
OPINION BY CLARK, J.

1. Post-November 1967 Employees

I agree with the majority's determination that the fourth paragraph of former Education Code Section 13337.5 1/

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1/ Except as otherwise noted, statutory references are to the Education Code prior to its recodification effective 40 April 1977.

Section 13337.5 provided: "Notwithstanding the provisions of Section 13337, the governing board of a school district maintaining a community college may employ as a teacher in grade 13 or grade 14, for a complete school year but not less than a complete semester or quarter during a school year, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees for grades 13 and 14 during a particular semester or quarter because of the higher enrollment of students in those grades during that semester or quarter as compared to the other semester or quarter in the academic year, or because a certificated employee has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board. [¶] Such employment may be pursuant to contract fixing a salary for the entire semester or quarter. [¶] No person

(Fn. 1 continued.)

precluded tenure for the post-1967 employees, who always served less than 60 percent of full time. However, the majority is incorrect to the extent they imply that such employees might obtain tenure in different circumstances. 2/

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shall be so employed by any one district for more than two semesters or quarters within any period of three consecutive years. [¶] Notwithstanding any other provision to the contrary, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee, and shall not become a probationary employee under the provisions of Section 13446."

2/ The majority state that the fourth paragraph of section 13337.5 shall "apply only to initial classification and not to preclude an otherwise authorized subsequent change from temporary status." (Ante, p. __.*) The statement suggests that some employees who never worked more than 60 percent of full time might obtain tenure. The majority's analysis, of course, is based on instant plaintiffs' particular factual situations. However, as demonstrated in the text, the nature of all assignments pursuant to the fourth paragraph of section 13337.5 precludes obtaining tenure. Thus, so long as an assignment fits within the 60 percent standard of section 13337.5, fourth paragraph, differing factual situations would not require any different results.

*Majority opinion, pages [Appendix 13]

The Legislature, in effect, has authorized several types of temporary instructor assignments. At least five were available to community college districts. 3/ Each type, however, was subject to limitations that, if exceeded, might permit the employee to advance to contract (probationary) status. Such limitations were expressed both within the section authorizing a particular type of temporary assignment and in the general limitations of sections 13336, third paragraph, and section 13446. 4/ It is

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3/ They were those authorized by section 13337 (three-month and four-month temporary employees; twenty-day emergency temporary employees), section 13337.3 (full year temporary employees filling vacancies), section 13337.5, paragraphs 1-3 (temporary assignments longer than one semester or quarter but less than one school year, needed because of vacancies or additional enrollment), and section 13337.5, paragraph 4 (temporary assignments of 60 percent or less of full time).

4/ Section 13336, third paragraph, provided: "Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a position requiring certification qualifications, be classified by the governing board as a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status."

Section 13446 provided: "Governing boards of school districts may dismiss

inappropriate to construe limitations on one type of temporary assignment as also applying to a different type. For example, an employee hired under section 13337 advances to contract (probationary) status if reemployed beyond the initial three-month or four-month assignment. However, another employee hired under section 13337.3 (assignment for period ranging from one semester to a complete school year) does not advance to contract status unless reemployed the following school year. 5/

The fourth paragraph of section 13337.5 created a unique temporary assignment, one whose limitation is not durational, but is based on hours worked

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temporary employees requiring certification qualifications at the pleasure of the board. A temporary employee who is not dismissed during the first three school months, or in the case of migratory schools during the first four school months of the school term for which he was employed and who has not been classified as a permanent employee shall be deemed to have been classified as a probationary employee from the time his services as a temporary employee commenced."

5/ Because of the potentially confusing array of available temporary assignments, the Legislature in 1974 amended section 13335 to require an annual statement of the duration and type of assignment filled by each temporary employee. Such statement permits districts and employees to remain aware of rights, obligations, and limitations under temporary assignments.

per week. By expressly making inapplicable the durational limitations of section 13446, the Legislature has provided a type of assignment that may be continued from year-to-year so long as the 60 percent limitation is not exceeded. 6/ (See Santa Barbara Fed. of Teachers v. Santa Barbara High School Dist. (1977) 76 Cal.App.3d 223, 239.)

The durational limitations of other sections authorizing temporary

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6/ The flexibility provided by such assignments is essential if community colleges are to keep up with the changing needs of their clientele. As found by the trial court in the instant case: "The District finds it necessary to change course offerings constantly in response to such factors as the general economy. Within the confines of a single school year, it may be necessary to add and delete courses by reason of such changing community demand. The California layoff statutes ... are inadequate to make adjustments because such proceedings ... occur at a time when it is not possible to foresee the specific changes in demand which will occur during the following school year." (Special Finding of Fact No. 2.)

The district has drawn a convincing picture of staff and program inflexibility that would be created by conferring tenure upon large numbers of part time instructors. Their required annual reemployment would inflexibly commit a large portion of the district's scarce salary funds. The district then would find it difficult or impossible to shift funds to new, higher-demand courses.

assignments are inapplicable to the fourth paragraph of section 13337.5 for three reasons. First, that paragraph states its provisions apply "[n]otwithstanding any other provision to the contrary...." That phrase plainly forbids using conflicting provisions of other statutes to alter the nature of the temporary assignment created by the fourth paragraph. To impose other statutes' durational limitations, in addition to the paragraph's own 60 percent limitation, would change the essential character of such temporary assignments, thus contravening the express words of the fourth paragraph. Second, other than the expressly excluded section 13446, the language of other sections pertaining to temporary assignments precludes their application to the fourth paragraph of section 13337.5. These include sections 13336 (applies only to assignments for a complete school year), 13336.5 (assignments of 75 percent of full time or more), 13337 (assignments limited by their own terms to three or four school months), 13337.3 (assignments for a complete school year), and paragraphs 1 to 3 of section 13337.5 (assignments for a complete school year or complete semester or quarter). Third, it distorts the statutory scheme to apply limitations of one type of assignment to the enabling language of another. This is demonstrated by the above example of sections 13337 and 13337.3. For all these reasons, the fourth paragraph of section 13337.5 is unencumbered by any durational limitation. 7/

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7/ The intent that no durational limitation apply to assignments under the fourth

In this sense, therefore, the fourth paragraph of section 13337.5 governs more than "initial classification." Rather, it authorizes a particular type of temporary assignment and establishes the single limitation thereto. So long as the parties do not exceed that 60 percent limitation, they are free to continue such assignment indefinitely.

The difficulty with the majority's explanation arises from its implication

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paragraph of section 13337.5 was underlined in the 1976 recodification of the Education Code. The Legislature eliminated the reference in that section's final sentence to the inapplicability of former section 13446. Section 13446 required advancement of an employee to probationary status after either three or four school months' service in temporary status. In place of that reference, the recodified section 87482 (former § 13337.5) refers to recodified section 87604, providing that a 60 percent temporary employee "shall not become a contract employee under the provisions of Section 87604." That latter section is not the same as former section 13446. The newer section 87604 contains no durational limitation, but simply provides that each community college instructor be employed either in contract, regular, or temporary status. This new reference to the basic classification statute--rather than one dealing with automatic advancement in status--demonstrates the intent that employees shall not be eligible for a change in status while employed as 60 percent temporary employees.

that, given different facts, the statutes might require a different result as to other 60 percent temporary employees hired after 1967. The majority's statutory analysis (ante, pp. __-___*), however, is equally applicable to the tenure entitlements of all 60-percent-or-less temporary employees hired pursuant to the fourth paragraph of section 13337.5. Limitations on other kinds of temporary assignments do not apply to an assignment under the fourth paragraph of section 13337.5. This same inapplicability exists as to the assignments of the instant plaintiffs as well as to any other individual hired pursuant to that paragraph. Thus, such other individuals would be equally ineligible for advancement beyond temporary status so long as they served no more than 60 percent of full time.

2. Back Pay Award to Pre-November 1967 Employees

I further dissent from the decision awarding pro rata back pay to the three pre-November 1967 employees. The majority--holding these employees are entitled to retroactive promotion to tenured status--find that section 13503.1 requires pro rata pay for such part time employees. However, section 13503.1, the sole authority relied upon by the majority, has no application to community colleges, but only to elementary and secondary levels. This is made clear by the section's own terms: "Any person employed by a district in a position requiring certification qualifications who serves less than the minimum schoolday as defined in Sections 11003 to 11008 [kindergarten to Grade 8],

34. *Majority opinion, pages [Appendix 12-19].

inclusive, or 11052 [high school] may specifically contract to serve as a part-time employee. In fixing the compensation of part-time employees, governing boards shall provide an amount which bears the same ratio to the amount provided full-time employees as the time actually served by such part-time employees bears to the time actually served by full-time employees of the same grade or assignment. This section shall not apply to any person classified as a temporary employee under Section 13337 and 13337.5, or any person employed as a part-time employee above and beyond his employment as a full-time employee in the same school district." (Italics added.)

The italicized language shows the Legislature limited eligibility under sections 13503.1 to grade levels described in sections 11003-11008 and 11052, that is, to elementary and secondary schools. It omitted reference to section 11103, the parallel section dealing with the community college minimum school day. The intent to exclude community colleges is apparent.

The statutory history also demonstrates that section 13503.1 applied only to elementary and secondary levels. Prior to 1968 the section applied to: "[a]ny person employed by a district in a position requiring certification qualifications who serves a lesser period of time than the majority of such employees in the same grades of the district are required to serve...." An amendment in 1968 adopted the earlier quoted wording restricting eligibility to elementary and secondary levels. (Stats. 1968, ch. 1079, § 2.) The amendment thus eliminated mandatory

pro rata pay for all employees and, in its place, required it only at elementary and secondary levels.

Furthermore, the 1976 reorganization of the Education Code reflects legislative understanding that section 13503.1 did not apply to the post-secondary level. In the reorganized code, section 13503.1 without change became section 45025, applicable solely to elementary and secondary schools. No cognate section was codified in title 3 of the reorganized code, which contains provisions affecting community colleges. Such singular recodification has compelling weight because the Legislature doubly recodified those sections affecting both levels--once in title 2 (elementary and secondary education) and again in title 3 (post-secondary education).

Such reenactment of a section in substantially similar language is to be construed as a restatement or continuation of its former meaning. ([Reorganized] Educ. Code, § 3.) By such "restatement," the Legislature confirmed section 13503.1 never applied to community colleges.

Substantial reasons exist for the Legislature's not requiring pro rata pay for part time community college employees. The great variance in content, duration, purpose, and enrollment of college courses requires employing instructors of differing skills, preparation, backgrounds, professional accomplishments, and time availability. Among college employees, part time instructors often have less teaching experience and less state credentialling than full time staff. While full ime staff must perform duties that include

preparation, teaching, conducting office conferences, fulfilling committee assignments, designing and evaluating curriculum, and assisting with budget decisions, part time staff often need only prepare for and teach classes. In these circumstances, colleges are amply justified in offering part time employment at a rate of $13.86 per hour, as in the instant case, rather than an amount pro rated to a full time rate of $32 per hour, as plaintiffs seek.

Similarly, as compared to part time elementary and secondary employees, part time community college instructors often are professional persons holding full time jobs elsewhere, with primary career preparation in their full time occupations. Part time elementary and secondary teachers, on the other hand, generally are persons whose sole employment is their part time position, and whose career preparation is in teaching. Thus, a logical basis also exists for distinguishing between part time employees at the community college and elementary-secondary levels.

The exclusion of section 13337.5 temporary employees in the last sentence of section 13503.1 is read by the majority as impliedly qualifying nontemporary community college employees for pro rata pay. They reason that such exclusion would not be necessary unless the remainder of section 13503.1 did apply to community college employees. A more reasonable interpretation, however, is that section 13337.5--which encompasses both adult schools and community colleges--was cited simply to complete the exclusion of all temporary employees. Such exclusion requires citation both of section

13337 (certain adult and day temporary employees) and 13337.5 (certain adult and college employees). A plain reading of the last sentence of section 13503.1 shows its intent was to deal with all temporary employees without regard to whether they taught elementary, secondary, adult, or college courses.

Thus, no requirement existed then or now for general pro rata pay for community college instructors. In such cases, it is established that, where no statutory requirements apply, the level of instructor salaries is determined by the governing board (Campbell v. Graham-Armstrong (1973) 9 Cal.3d 482, 489) or by contractual agreement (Holbrook v. Board of Educ. (1951) 37 Cal.2d 316, 331; Richardson v. Board of Educ. (1936) 6 Cal2d 583, 586.) As the trial court found, plaintiffs agreed to be paid at the district's hourly rate. (Special Finding of Fact No. 4.)

The agreed-upon rate, however, was subject to the pro rata minimum of section 13525. That section required plaintiffs be paid not less than "an amount which bears the same ratio to six thousand dollars ($6,000) as the time required of the person [plaintiffs] bears to the time required of a person employed full time." The full time assignment, of course, includes not only class hours, but additional laboratory, conference, office, and other assigned hours (52 Opns.Cal.Atty.Gen. 218, 220 (1969)), while plaintiffs' part time assignments generally were limited to classroom hours only.

Plaintiffs thus are entitled to

recover as back pay not an amount pro rated to the salary of regular employees but the greater of either the agreed-upon hourly rate or the section 13525 minimum.

CLARK, J.

I CONCUR:

RICHARDSON, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

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| PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO; PERALTA PART-TIME TEACHERS ASSOCIATION; EDWARD A. WALKER, JEFF KERWIN, and MARLO LONERO, individually and for and on behalf of all persons similarly situated, | ) | |
| Plaintiffs, Respondents and Appellants, | ) | |
| vs. | ) | 1 Civil 38508 |
| PERALTA COMMUNITY COLLEGE DISTRICT; GOVERNING BOARD OF THE PERALTA COMMUNITY COLLEGE DISTRICT, | ) | (Sup.Ct. No. 449204-3) |
| Defendants, Appellants and Respondents. | ) | |

Twelve teachers who have been employed by Peralta Community College District (supported by plaintiff federation of which they are members) sought writ of mandate to compel the district and its governing board to grant them tenured status and to compensate them at a certain rate of pay. The trial court granted the writ to classify some of the teachers as permanent and others as contract employees, but denied the petition as it relates to pay. The district appeals from that portion of the judgment which has to do with classification

and the teachers cross-appeal from the part which concerns compensation.

1. Preliminary Explanation

The district employs between 1200 and 1300 instructors at its five campuses. There are three classes of instructors: regular ("permanent" or "tenured"), contract ("probationary") and temporary. 1/ Some regular and contract teachers are employed part time, and these are paid a salary prorated to the salary of a full-time teacher. Temporary teachers are paid a flat hourly rate which is less than the rate which the salaried employee receives; they do not receive certain fringe benefits which are accorded those of the two higher classes; they may be dismissed without notice or hearing.

Plaintiffs all work less than 60 percent of full time. They receive a written letter of notification from the district regarding their employment for the coming academic year. The letter states the instructor's potential assignment and specifies that his position is a temporary one. They are hired from quarter to quarter or from semester to semester, as the case may be. They are uniformly dismissed at the end of each year.

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1/ There are three classes of certificated persons: regular, contract and temporary. Formerly, regular employees were named "permanent" by statute, but were often referred to as "tenured"; contract employees were "probationary." (See Ed. Code, § 13345.10.)

Because different questions of law are applicable to teachers hired at different times, it is necessary to divide the twelve individual plaintiffs into two categories and to consider each category separately. (This is not a class action.)

2. Teachers Employed Before November 8, 1967

Three of the plaintiffs have been employed year after year, but as temporary employees, annually discharged and rehired, commencing at dates earlier than the statutory changes (described below) of November 8, 1967. The trial judge ordered that the three plaintiffs be classified as part-time regular employees.

In order to become a regular (permanent) employee, one must first become a contract (probationary) employee. Prior to September 1, 1972, three years' service as a contract (probationary) employee was needed as a basis for permanent (tenured) status.

Two questions, then, are before us at this point: (1) Did these three plaintiffs become contract (probationary) employees? and (2) did they attain tenure as regular employees? The district argues that the teachers may rightly claim neither status, although probably the denial of probationary status is based only on asserted procedural deficiencies in the manner of asserting their rights.

Prescinding from the procedural matters, which are discussed below, we deem the first question to have been answered by the decision in Balen v. Peralta Junior College District, 11 Cal.

3d 821. Balen had been employed for four successive years since 1965 by the district as a temporary instructor. Then he was informed that his contract would not be renewed. It was held that under Education Code section 13334, which provides that "Governing boards of school districts shall classify as probationary employees, those persons employed in positions requiring certification qualifications for the school year, who have not been classified as permanent employees or as substitute employees," Balen met the statutory prerequisites for probationary employment, although he was a part-time instructor. (At p. 829.) Plaintiffs meet the same prerequisites. Section 13337.5 of the Education Code, enacted in 1967, which gives authority to a district to employ temporary teachers under certain conditions without conferring probationary status on them, was held to be nonretroactive; it could not divest plaintiff of his previously acquired status. 2/ The three pre-1967 employees became contract (probationary) employees prior to the enactment of section 13337.5.

The second question is whether they acquired regular (permanent) status. Pursuant to section 13304 each such employee would be entitled to regular

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2/ Section 13337.5 has been reenacted substantially, with one change noted later in this opinion, by section 87482 of the Reorganized Education Code, to become effective April 30, 1977. All other references to sections of the Education Code in this opinion are to the sections as numbered prior to April 30, 1977.

status if he had served three complete consecutive school years. A "complete school year" was defined for community college employees as "75 percent of the number of hours considered as a full-time assignment for permanent employees." (§ 13328.5.) It was found by the trial court that none of the above named employees met the 75 percent requirement. In 1972, major revisions in the Education Code were made with respect to community college instructors (the "Rodda Act"). The teachers contend that by virtue of the new provisions, the 75 percent rule set forth in section 13328.5 has no further application.

Section 13346.25, effective in 1972, provides that if a contract (probationary) employee is employed under his second consecutive contract, the governing board has two options: to employ him as a regular employee for all subsequent academic years or not to employ him as a regular employee. But in the case of a contract (probationary) employee, the district's right to do this is limited by the requirement of section 13443 that notice of nonemployment be given with the reasons stated. It would not be sufficient reason, under Balen, to declare that the employment had been temporary only, no matter what the teacher's contract might say (Campbell v. Graham-Armstrong, 9 Cal.3d 482, 486-487) because these teachers had attained contract status before 13337.5 was enacted. In the case of contract (probationary) teachers, the decision not to reemploy must be based on "thoughtful, deliberate, and individual consideration." (Balen v. Peralta Junior College Dist., supra, at p. 830, fn. 10.) These teachers were simply regarded as

"temporaries" and were not afforded the prescribed decision.

But it was still required that a part-time pre-1967 contract employee serve 75 percent of the hours under section 13328.5 in order to qualify for reemployment under the new (1972) section 13346.25 as a regular part-time employee in the absence of a decision of the board, supported by a valid reason, not to reemploy? It is concluded that the 75 percent requirement of 13328.5 does not apply to these pre-1967 employees; that the provisions of the later section 13346.25 take precedence. We agree with an opinion of the Attorney General to the effect that, although section 13328.5 remains on the books, it has been rendered meaningless, at least insofar as the acquisition of tenure is concerned. (58 Ops.Cal.Atty. Gen. 703 (1975).) The pre-1967 teachers must be classified as part-time regular employees as of July 1, 1974 (this date is in accordance with section 25490.20(b)).

3. Post-November 8, 1967

Nine of the twelve individual plaintiffs were hired later than November 8, 1967, the effective date of section 13337.5 and, of course, the nonretroactivity element which entered the Balen case and which we have recognized as to the three pre-1967 employees, is inapplicable. The trial court held these teachers to be classified as part-time contract (probationary) employees. Section 13337.5 is set forth below. 3/

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3/ Notwithstanding the provisions of Section 13337, the governing board of a

The effect of the first two paragraphs of section 13337.5 is to expand

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school district maintaining a community college may employ as a teacher in grade 13 or grade 14, for a complete school year but not less than a complete semester or quarter during a school year, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees for grades 13 and 14 during a particular semester or quarter because of the higher enrollment of students in those grades during that semester or quarter as compared to the other semester or quarter in the academic year, or because a certificated employee has been grated leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

Such employment may be pursuant to contract fixing a salary for the entire semester or quarter.

No person shall be so employed by any one district for more than two semesters or quarters within any period of three consecutive years.

Notwithstanding any other provision to the contrary, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee, and shall not become a probationary employee under the provisions of Section 13446.

he classification of temporary employees under the described circumstances by allowing hiring for a complete school year instead of the former maximum of three months as provided by section 13337. But plaintiffs contend that, although the district has hired many instructors in compliance with 13337.5, because their employment was to fill needs for higher enrollment, or to fill vacancies caused by leaves or by long-term illness, these plaintiffs were not hired for any of these purposes, but were hired for the general educational process. This fact, plaintiffs contend (the district admits the factual contention), removes them from the category of temporary employees and placed them first in the class of contract (probationary) employees, and later, in the class of regular (permanent) employees.

A second reason offered by plaintiffs for this position is that their employment has exceeded the time limit imposed by section 13337.5. All temporary employees hired under section 13337.5 are subject to a time limit of two semesters within any three consecutive years, as set forth in the third paragraph of section 13337.5. The teachers reason that section 13337.5, while expanding the classification of temporary employees, was designed to prevent perpetuation of nontenured status by imposing a limitation of two years during which an employee hired under this section could be classified as temporary.

The district, on the other hand, contends that the fourth paragraph of section 13337.5, pertaining to employees who undertake less than 60 percent of a full-time workload, creates independent

authority, separate and distinct from the first and third paragraphs, for long-term classification of temporary employees. We decide that the district's position is correct.

By its own language, section 13337.5 authorizes community colleges to employ two types of employees to be designated as temporary: (1) those hired for up to a year to meet certain specified needs, and (2) those hired on a part-time basis at less than 60 percent of a full-time workload. This is recognized in Balen v. Peralta Junion College District, supra, wherein the court characterized section 13337.5 as follows: "Section 13337.5, however, substantially changes the classification system by expanding the temporary designation to include not only designated yearly employees, but other instructors who do not meet the new minimum workload requirement for attaining probationary status." (11 Cal.3d at pp. 828-829, fn. 8.)

The first group of employees, then, are those hired to meet unexpected enrollment needs or to fill vacancies caused by an employee's leave of absence or long-term illness. (§ 13337.5, para. 1.) These employees "so employed" are subject to a time limitation. (§ 13337.5, para. 3.)

The second group is the one in which the plaintiffs fit. The last paragraph of section 13337.5 commences with a sweeping renunciation of any statutory, contractual or inferential authority to classify these teachers who carry less than the 60 percent workload as other than temporary employees. "Notwithstanding any

other provision to the contrary," it reads. But whatever may be the statute or provision under which these teachers claim contract (probationary) or regular (permanent) status, that statute or provision must be "to the contrary." Being to the contrary, it is ineffectual.

It appears that the last paragraph's reference to "any other provision to the contrary" is not directed particularly toward anything contained in the preceding parts of section 13337.5 itself but rather toward any statutory provision elsewhere to be found or to any inference to be drawn therefrom. The beginning words of section 13337.5, "Notwithstanding the provisions of Section 13337," show that if application of the last paragraph were limited to 13337.5 itself, there, also, the Legislature would have used specific designation of what was being circumscribed. 4/ Moreover, there is nothing in the preceding paragraphs of section 13337.5 which is to the contrary; the teachers employed under its terms are temporary teachers. The last paragraph operates beyond the boundaries of its own section; it operates against any contrary provision which would affect a "60 percent or under" employee. On the other hand, it operates positively, giving authority to the district to employ persons with

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4/ A like differentiation is to be found in sections 13337.6 and 13337.7; the former says, "notwithstanding the provisions of Section 13337"; the latter, "Notwithstanding any other provision," although even this is not as strong as that in the last paragraph of 13337.5.

relatively low workload and it does not restrict the duration of the employment. The limit to two semesters or quarters in the third paragraph is directed toward persons "so employed," i.e., under the first paragraph. No similar provision follows the last paragraph.

There is further internal evidence that the last paragraph of 13337.5 is not designed to be read only in connection with the preceding paragraphs. Thus, the second paragraph of the section, relating to salary, speaks of "such employment"--that is, employment authorized by the first paragraph, in cases of higher enrollments, leaves of absence or long-term illnesses. The last paragraph makes no reference to "such employment"; in striking contrast, it annuls anything to the contrary with its terms. The third paragraph refers to "so employed," again a reference to that authorized by the first.

Besides, the last paragraph covers the "under 60 percent" employees in adult as well as in community college classes. There is no other reference to adult classes in 13337.5. Wherefore, the last paragraph has a vitality of its own; it operates beyond the rest of section 13337.5 to exclude the gaining of probationary status.

Finally, if the last paragraph of section 13337.5 does not mean to limit the "under 60 percent" employees to temporary status, it lacks meaning. Those who are employed under the conditions described in 13337.5 are designated temporary employees by the first paragraph; this is so

whether they work 100 percent of the full-time assignment or 5 percent thereof. If the last paragraph were to apply superfluously to these only, it would be better if the legislative committee had not met to propose it. Statutes should be so constructed as to make every part significant. (Cal Pacific Collections, Inc. v. Powers, 70 Cal.2d 135, 139; Azusa Western, Inc. v. City of West Covina, 45 Cal.App.3d 259, 266.) Particularly is this so when the statute in question is so emphatic in abjuring "anything to the contrary" and in employing twice the word "shall" which is mandatory (Ed. Code, §36), saying: these employees shall be classified as temporary and shall not become probationary under 13446.

There is good reason for construing the section as we have done; we say this, not by way of showing our preference as against arguments for policy to the contrary, but by way of supporting, by reference to its reasonableness, what appears to be a positive declaration of the Legislature. There was testimony of the district's Vice Chancellor that temporary teachers are engaged mainly in vocational courses, staffed largely by persons holding full-time jobs in technical or business situations and general education, either for students who will transfer to universities or who seek satisfaction in one or another art or science; but the demand, especially in the vocational field, changes constantly and considerably. The Vice Chancellor stressed that flexibility is essential in order to terminate temporary instructors who are not currently needed and to employ those whose specialties are commanding present interest.

Indeed, to hold with plaintiffs, it would be necessary for us to generate a "notwithstanding" clause of our own, to the effect that "Notwithstanding the provisions of Section 13337.5 that notwithstanding any other provision employees carrying a less than 60 percent workload shall be classified as temporary employees, they shall be classified as contract (probationary) employees if there is any other available provision."

Plaintiffs rely to a large extent on Balen v. Peralta Junior College District, supra, and on Ferner v. Harris, supra. The Balen case was one in which summary judgment for the defendant district was reversed. Balen had acquired probationary status before section 13337.5 was enacted. The essence of the decision by the Supreme Court (1) that part-time employment may confer contract (probationary) status and (2) that a teacher who has attained that status cannot be deprived of it by the last paragraph of section 13337.5. Nor could that paragraph be made to operate "prospectively" by firing Balen and rehiring all other teachers who had made contracts for yearly employment even though many had equal to or better than contract (probationary) status each year after the date of the enactment. This practice was held to be a circumvention of the rights of a contract (probationary) or a permanent employee--Balen's status as between these two had not been made clear.

But does Balen hold, or imply by language which we surely should respect,[5/]

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5/ In Coffey v. Governing Board of the

that section 13337.5 is of no effect even as to an employee who, unlike Balen, had not attained probationary status? Plaintiffs say that it does; we do not read it thus. The very fact that so much emphasis is placed on the nonretroactivity of the section gives some evidence that an employment subsequent to the effective date of the statute would be decided differently.

But plaintiffs point to this language in Balen at page 829:

> The paragraph of section 13337.5 which the district cites to justify its classification of Balen was not part of the original bill submitted to the Legislature, but was added in committee. (1 Sen. J. (1967 Reg. Sess.) p. 863.) The principal portion of the original bill created a long-term temporary status, a classification within which the district urges Balen falls. That part of the statute, however, specifically limits such a classification to persons employed for not more than

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San Francisco Community College District, 66 Cal.App.3d 279, at pages 292-293, there is an impressive statement of the reasons, including the legislative history of 13337.5 and the analysis made by the Legislative Council, why the last paragraph should be interpreted as we have done. But the court deemed itself bound by Balen. We share the respect for the author of Balen, which the Coffey author expressed, as we respect the author of Coffey; we simply do not read Balen as having decided the point where the issue of retroactivity is not involved.

"two semesters or quarters within any period of three consecutive years." Failing to consider this limitation, the district selectively relies on the last paragraph of the statute alone. Because Balen held his position for over four years, he could not be classified under section 13337.5 for more than two of those years, a circumstance which would leave him unclassified the remainder of the time. (4) Such an anomalous result is additional indication that the statute should not be applied retroactively.

The above passage expressly says that it is an additional reason for holding 13337.5 to be nonretroactive; the court had already held so on other more fundamental grounds. This is the essence of the passage: Nonretroactivity. The reference to the last paragraph of 13337.5 in the first sentence of the passage appears to be introductory. The next sentence says that the district urges that plaintiff Balen falls within the principal portion (the first paragraph) of 13337.5, and the succeeding sentences reject that proposition. But in the present case, the district does not rely on the "principal portion" of 13337.5 (quasi-emergency situations with a two-year limitation); it relies on the last paragraph of 13337.5 in cases wherein there is no question of retroactivity; in cases wherein the employees with lesser workloads have been employed since the statute expressly mandating their classification as temporary went into effect.

But, say plaintiffs, any doubt must be dispelled by Ferner v. Harris, supra, 43 Cal.App.3d 363. Here again, however, the teacher had attained advanced status, in fact, regular (permanent) status inde-

pendently of section 13337.5. Therefore, the fourth paragraph of section 13337.5, which provides that an "under 60 percent" employee shall not become a probationary employee, would not apply to Ferner, who was not a merely probationary but a regular employee. The court did say, correctly, that Ferner could not have become a temporary employee under 13337.5 because he was not engaged under the first paragraph thereof. But we do not regard this additional holding as negating the application of the last paragraph of 13337.5 to employees who had not attained at least probationary status and whose workload was under 60 percent.

Plaintiffs say that even if, arguendo, Balen and Ferner are not controlling, the last paragraph does no more than to prevent the "60 percent or under" persons from attaining probationary status under section 13446, which section refers (besides employees of migratory schools) only to persons who, having been employed in classes intended to last not longer than three months, were protracted beyond that time. This is too narrow a reading. The paragraph says that any "under 60 percent" shall be classified as temporary employees. (Section 13337.5 has been renumbered in the Reorganized Education Code, operative April 30, 1977, as section 87482. The last paragraph contains the same imperative that the under 60 percent employee shall be classified as a temporary employee, but goes on to state that he shall not become a contract employee under the provisions of section 87604. Section 87604 reads: "The governing board of a community college district shall employ each certificated person as one of the following: contract employee, regular employee, or temporary employee." We regard the change as a clarification enacted in order

to make it plain that under no circumstances shall such employee attain preferred status.)

The yearly letter of dismissal of the "under 60 percent" employees no doubt is unnecessary, because, as we conclude, they are temporary employees and their contracts simply lapse. (See Balen v. Peralta Junior College Dist., supra, at p.831, fn. 10.) But they should not have had an expentancy, although many may have had the desire, for reemployment. Their position is different from that of contract (probationary) employees who rightly do have the expectancy because of their right to notice, and because blanket dismissal would circumvent their proper classification. No classification procedure is circumvented by the following of the last paragraph of 13337.5.

4. The Subject of Salaries Considered Substantively (Apart from Procedural Defenses) (Set Forth in Full Below)

Section 13503.1 declares that its provisions for pro rata compensation of part-time employees (that is, a percentage of the pay of full-time employees, rather than the lesser established hourly wage) do not apply to any person classified as a temporary employee under section 13337 or 13337.5. Therefore, under our decision that those "under 60 percent" who were employed after November 8, 1967 are to be classified as temporary teachers, the nine plaintiffs so employed are not entitled to pro rata pay.

But the same section requires pro rata pay for part-time regular or contract employees. Thus, apart from the defenses

of the statute of limitations, laches and failure to seek administrative relief, the three pre-1967 plaintiffs are entitled to prorated wages as back pay. Against this conclusion, the district argues that section 13503.1 applies only to elementary and secondary schools and schools for the handicapped by its reference to sections 11003 to 11008, inclusive, and to 11052. But this reference merely points out the places where a minimum school day is defined. Section 13503.1 refers to "[a]ny person employed by a district." (Emphasis added.) Further, the reference to 13337 and 13337.5, in excluding temporary employees classified under these sections, clearly implies that section 13503.1 does embrace community college districts in its positive part, otherwise the specific exclusion would be unnecessary.

The district contends that the instructors are bound by the terms of their employment contracts. This is so when there is no statutory provision to the contrary. But it is not so in the face of statutory specification. (Campbell v. Graham-Armstrong, supra, 9 Cal.3d 482, 486-487.) In Campbell, the teachers had contracted to teach one session of kindergarten at part-time salary rate of pay below the minimum salary set by statute for full-time employees. On the issue of a contractual waiver, it was held that pursuant to section 13338.1, the teachers' contractual agreement did not preclude their entitlement to full-time salary.

The part-time employee who has attained regular or contract status" generally serves under conditions comparable to those of his full-time counterpart." (Balen v. Peralta Junior College Dist., supra, at p.829.) The three regular teachers are entitled, under substantive law, section 11503.1, to pro rata pay.

5. Statute of Limitations

A mandamus proceeding by teachers seeking proper classification and salary is subject to Code of Civil Procedure section 338, subdivision (1), the three-year statute, because it is upon a liability created by statute. (Vittal v. Long Beach Unified Sch. Dist., 8 Cal.App.3d 112; Ingram v. Board of Education, 36 Cal.App.2d 737, 739; Baldwin v. Fresno City etc. School Dist., 125 Cal.App.2d 44, 51.) The petition was filed on May 2, 1974, so it relates back to May 2, 1971. Those plaintiffs who are declared herein to have temporary status do not have rights that are affected by the statute of limitations. The three pre-1967 employees' status as probationary employees was acquired before May 2, 1971; their right to pro rata compensation commences July 1, 1971, and not earlier, because of the statute of limitations.

6. Laches

The trial judge did not make a finding on the subject of laches as related to the three employees who, under our decision, are entitled to probationary status and to pro rata pay. But we decide that, as a matter of law, these employees' rights are not barred by laches, because of the rather bewildering array of statutory changes which confronted them, so that, as was said in Balen: "[I]t is understandably difficult for an individual teacher to define conclusively his status at a particular time." (At p. 827.) How and when to proceed toward judicial determination was not a simple matter. Indeed, Balen's case, which is similar to that of our three pre-1967 employees, filed December 4, 1970, was decided against him in the superior court

by summary judgment and this judgment was sustained by the Court of Appeal (Balen v. Peralta Junior College Dist., App., 111 Cal. Rptr. 343), though it was reversed by the Supreme Court June 28, 1974. But these plaintiffs commenced this proceeding even before the Supreme Court's decision. They should not be charged with unreasonable delay, in view of the complexity and duration of the comparable Balen litigation and of the district's uncompromising position (also understandable conduct in the circumstances).

7. Failure to Exhaust Administrative Remedies

The district argues that no writ of mandate can be issued because the plaintiffs have not exhausted their administrative remedies.

Prior to the enactment of the Rodda Act, there was no statutory procedure for an administrative review of an instructor's classification or salary. Accordingly, it was held that no application need be made to the college by the employee for acquisition of his proper status; no affirmative action was required by the governing board. The attainment of the proper classification was automatic. (Vittal v. Long Beach Unified Sch. Dist., supra; Holbrook v. Board of Education, 37 Cal.2d 316, 333-334; 43 Cal. Jur.2d, Schools, § 461, p. 847.)

Since 1972, under the Rodda Act, a second-year contract employee has been entitled to a hearing upon objection to the governing board's decision not to employ him as a regular employee. (§133346.32.)

However, this statutory remedy

presupposes that a decision is made by the board not to employ the second-year contract employee as a regular employee. In the case at bar, the district made no such decision with respect to plaintiffs, because the district considered plaintiffs to be temporary employees. Accordingly, plaintiffs received no notice of the board's decision pursuant to section 13346.30.

Moreover, it has been held that the rule requiring exhaustion of administrative remedies is subject to exception if the petitioner knows what the agency's determination will be. (Ogo Associates v. City of Torrance, 37 Cal. App. 3d 830, 834.) In the present case, the board refused to discuss the matter because the issues were in other litigation.

The district's contention is rejected.

The judgment is reversed with directions to the superior court to issue a writ of mandate ordering defendants to classify those employees who were employed prior to November 8, 1967 as part-time regular certificated employees as of July 1, 1974, and to award them back pay from July 1, 1971, prorated according to their classifications; and to classify those employees who were employed subsequent to November 8, 1967, as temporary employees. Each side will bear its own costs of appeal.

CERTIFIED FOR PUBLICATION

We concur: _____ Devine, J.*

_____ Draper, P.J.

_____ Scott, Jr.

Trial Court: Superior Court, Alameda County

Trial Judge: Zook Sutton

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* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

IN THE SUPERIOR COURT OF

THE STATE OF CALIFORNIA FOR THE

COUNTY OF ALAMEDA

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| PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al., | ) | |
| Petitioners, | ) | NO: 449204-3 |
| vs. | ) | JUDGMENT |
| PERALTA COMMUNITY COLLEGE DISTRICT, et al., | ) | |
| Respondents. | ) | |

This matter having come on for trial on May 19, 1975, Petitioners being represented by the law firm of VAN BOURG, ALLEN, WEINBERG, WILLIAMS & ROGER and STEWART WEINBERG, Respondents being represented by RICHARD J. MOORE, County Counsel and JON HOUDAK, Deputy County Counsel, evidence both documentary and testimonial having been received, the matter having been verbally argued and written briefs having been received, the Court having made and filed its Memorandum of Intended Decision on June 18, 1975, and the Court having issued its Findings of Fact and Conclusions of Law, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petition

For Writ of Mandate for pro-rata pay be denied. That Petition for Writ of Mandate be graned and Writ of Mandate issued as follows:

A Writ of Mandate issue directing Respondents Peralta Community College District and Governing Board of the Peralta Community College District to reclassify Edward A. Walker, Dr. Virginia Franklin, Gertrude Y. Fator, Jeff Kerwin, Mark Greenside, Helen Thomas and Lisa Rubens as part-time tenured employees within ten (10) days after the service of notice of entry of judgment.

A writ of Mandate issue directing Respondents Peralta Community College District and Governing Board of the Peralta Community College District to reclassify Leroy Votto, Dr. Wei Ren Feng, Gerald Suminiski, David R. Fielder and Dr. Brenda Schildgen as part-time probationary employees of the Peralta Community College District and, within ten (10) days after the service of the notice of entry of judgment herein either employ said persons as part-time regular employees or give said persons written notice that his or her services will not be required for the ensuing school year stating the reasons therefor in the manner provided in Subdivision (a) of Section 13443 of the Education Code, and afford such persons a hearing if a hearing is requested. Upon the giving of such notice, all time periods and deadline dates prescribed in Education Code Section 13443 shall be coextensively extended.

Petitioners are entitled to their costs of suit.

Dated: July 25, 1975

JUDGE OF THE SUPERIOR COURT

IN THE SUPERIOR COURT OF

THE STATE OF CALIFORNIA FOR THE

COUNTY OF ALAMEDA

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| PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO; PERALTA PART-TIME TEACHERS ASSOCIATION; EDWARD A. WALKER, JEFF KERWIN, and MARLO LONERO, individually and for and on behalf of all persons similarly situated, | ) | |
| Petitioners, | ) | No: 449204-3 |
| vs. | ) | |
| PERALTA COMMUNITY COLLEGE DISTRICT; GOVERNING BOARD OF THE PERALTA COMMUNITY COLLEGE DISTRICT, | ) | ORDER FOR THE ISSUANCE OF A PEREMPTORY WRIT |
| Respondents. | ) | OF MANDATE |

This matter having come on for trial on May 19, 1975, Petitioners being represented by the law firm of VAN BOURG, ALLEN, WEINBERG, WILLIAMS & ROGER and STEWARD WEINBERG, Respondents being represented by RICHARD J. MOORE, County Counsel and JON HUDAK, Deputy County Counsel, evidence both documentary and testimonial having been received, the matter having been verbally argued and written briefs having been received, the Court having made and filed its Memorandum

of Intended Decision on June 18, 1975, and the Court having issued its Findings of Fact and Conclusions of Law, and good cause appearing,

IT IS HEREBY ORDERED that a Preemptory Writ of Mandate issue directing Respondents, and each of them, to reclassify Edward A. Walker, Dr. Virginia Franklin, Gertrude Y. Fator, Jeff Kerwin, Mark Greenside, Helen Thomas and Lisa Rubens as part-time tenured employees within ten (10) days after the service of the notice of entry of judgment herein.

IT IS HEREBY FURTHER ORDERED that the Peremptory Writ of Mandate shall direct Respondents, and each of them, to reclassify Leroy Votto, Dr. Wei Ren Feng, Gerald Suminiski, David R. Fielder, and Dr. Brenda Schildgen as part-time probationary employees of the Peralta Community College District and, within ten (10) days after service of the notice of entry of judgment herein either employ said persons as part-time regular employees or give said persons written notice that his or her services will not be required for the ensuing school year stating the reasons therefor in the manner provided in Subdivision (a) of Section 13443 of the Education Code, and afford such persons a hearing if a hearing is requested. Upon the giving of such notice, all time periods and deadline dates prescribed in Education Code Section 13443 shall be coextensively extended.

Dated: JUL 25 1975

/s/ Zook Sutton
JUDGE OF THE SUPERIOR COURT

IN THE SUPERIOR COURT OF

THE STATE OF CALIFORNIA FOR THE

COUNTY OF ALAMEDA

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| PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO; PERALTA PART-TIME TEACHERS ASSOCIATION; EDWARD A. WALKER, JEFF KERWIN, and MARLO LONERO, individually and for and on behalf of all persons similarly situated,<br><br>Petitioners,<br><br>v.<br><br>PERALTA COMMUNITY COLLEGE DISTRICT; GOVERNING BOARD OF THE PERALTA COMMUNITY COLLEGE DISTRICT,<br><br>Respondents. | No. 449204-3<br><br>FINDINGS OF FACT AND CONCLUSIONS OF LAW |

This matter having come on for trial on May 19, 1975, Petitioners having been represented by the law firm of VAN BOURG, ALLEN, WEINBERG, WILLIAMS & ROGER and STEWART WEINBERG, Respondents being represented by RICHARD J. MOORE, County Counsel and JON A. HUDAK, Deputy County Counsel, evidence both documentary and testimonial having been received, the matter having been verbally argued and written briefs having been received, the Court having made and filed its Memorandum of Intended Decision on June 18, 1975, and good cause appearing therefor, the Court now makes the following Findings of Fact and

Conclusions of Law:

## FINDINGS OF FACT

1. Petitioners, Peralta Federation of Teachers, Local 1603, American Federation of Teachers, AFL-CIO and Peralta Part-Time Teachers Association are Employee Organizations within the meaning of the Winton Act, specifically Education Code Sections 13081, 13083 and 13084.5.

2. Edward Walker and Jeff Kerwin, Petitioners herein, are employees of the Peralta Community College District and the Governing Board of the Peralta Community College District. Petitioner Walker is a member of the Peralta Federation of Teachers, Local 1603 and Petitioner Kerwin is a member of the Peralta Federation of Teachers, Local 1603 and the Peralta Part-Time Teachers Association.

3. Dr. Virginia Franklin, Gertrude Fator, Mark Greenside, Helen Thomas, Lisa Rubens, Leroy Votto, Wei Ren Feng, Gerald Suminiski, David Fielder and Brenda Schildgen are members of either the Peralta Federation of Teachers, Local 1603 or the Peralta Part-Time Teachers Association, and are employees of the Respondent Peralta Community College District and the Governing Board of the Peralta Community College District.

4. The Peralta Community College District is a school district organized pursuant to the Education Code and administered by the Governing Board of the Peralta Community College District. The Peralta Community College District operates five community colleges, the College of Alameda, Feather River College, Laney

College, Merritt College and North Peralta Community College.

5. Each of the campuses of the Peralta Community College District employs teachers on a hourly basis and on a contract basis. Hourly instruction is conducted on a part-time basis, contract teaching is either full time or part time, but all full-time teaching is pursuant to a contract.

6. A contract teacher is either regular, also known as permanent, or probationary which is either a Contract I or Contract II teacher. A permanent teacher cannot be removed from his or her employment except for cause pursuant to Education Code Sections 13403 et seq. A contract teacher in his or her second year of employment cannot be removed without a hearing. A contract teacher in his or her first year of employment can be removed with notice and statement of reasons but has no right to a hearing.

7. An hourly teacher is considered to be temporary by the Peralta Community College District and as a temporary teacher, can be removed without notice, cause or hearing.

8. The Respondent, Peralta Community College District, employs some hourly teachers to teach the same or similar courses as taught by some contract or regular teachers.

9. Appreciable and significant differences exist between the characteristics of temporary employees as a group, compared to regular or contract employees as a group, in such matters as educational

qualifications, experience, required work activities and involvement in outside employment. In this respect:

a. As a group the temporary instructors have less experience in the field of teaching than the contract or regular instructors.

b. The District employs as temporary teachers some persons holding standard designated subjects part-time credentials, which limit such persons to teaching not more than 50% of the hours per week considered a full-time assignment.

c. The District employs some temporary teachers holding community college limited service credentials which limit the holders thereof to teaching not more than the 40% of the hours per week considered a full-time assignment.

d. The required work activities for contract or regular instructors include the following five functions: preparation, teaching, office hours, committee work and other professional activities. Only preparation and teaching are required of temporary teachers.

e. The average temporary teacher employed by the District holds a full-time job elsewhere and receives less than 10% of his total income from his Peralta employment.

10. The compensation received by hourly instructors is not related to the compensation paid to contract instructors on a pro-rata basis having a direct relationship to the amount of hours spent in the classroom. The compensation paid to

hourly, part-time instructors is substantially less than the compensation paid to contract instructors.

11. The Rules and Regulations of the Peralta Community College District require that contract teachers hold office hours, prepare for their classes and conduct classes. The Rules also indicate an expectation that they will engage in professional activities and perform committee work, although there is no monitoring system at the district level by the Community College District. Hourly instructors are expected to prepare for their classes and teach the classes.

12. There is a substantial economic advantage to the Community College District to employ hourly part-time instructors.

13. There is a substantial convenience to the Community College District in employing hourly employees as temporary employees.

14. The failure to pay hourly part-time instructors on a pro-rata basis compared to a contract instructor does not violate the equal protection clauses of the California or Federal Constitutions.

15. The Petitioners have exhausted administrative remedies for and on behalf of the persons enumerated hereinabove to bring an action on their behalf. However, on April 2, 1973, the District adopted a grievance procedure. None of the petitioners or persons for whom relief is sought in this lawsuit has sought probationary status, tenured status or pro-rata pay pursuant to said grievance procedure.

16. Edward Walker was hired by the Respondents in September of 1964 and worked for three consecutive years thereafter carrying an average load of 40 percent of the number of hours considered full time in his department. Dr. Virginia Franklin was hired by the Respondents in September of 1967 and carried an average load of 31 percent of the number of hours considered a full-time load in her department for three consecutive years following her employment. Gertrude Fator was hired in September of 1967 and worked for three consecutive years carrying 50 percent of the load considered a full time in her department. Jeff Kerwin was hired in February of 1970 and worked for three consecutive years thereafter carrying 50 percent of the load considered a full time in his department. Mark Greenside was hired in April of 1971 and for three consecutive years thereafter carried 50 percent of the load considered full time in his department. Helen Thomas was hired by the Respondents in September of 1969 and worked for three consecutive years thereafter averaging 50 percent of the amount of time considered a full-time load in her department. Lisa Rubens was hired by the Respondents in September of 1969 and for three consecutive years thereafter averaged 33-1/3 percent of the load considered full time in her department.

17. Leroy Votto was hired by the Respondents in September of 1972 as a part-time probationary employee.

18. Dr. Wei Ren Feng, Gerald Suminiski, David Fielder and Dr. Brenda Schildgen were hired in September of

1973 as part-time probationary employees of the Respondents.

19. As of September, 1972, the Peralta Community College District could terminate part-time probationary employees during their first year of employment by giving them notice but not affording them the right to a hearing. In the second year of the employment of part-time probationary employees, the Peralta Community College District could terminate such employees by giving them notice and an opportunity to request such a hearing. The failure of Leroy Votto, Dr. Wei Ren Feng, Gerald Suminiski, David R. Fielder and Dr. Brenda Schildgen to assert their rights in a timely fashion resulted in the prejudice of the Peralta Community College District to terminate such employees by giving them a notice and opportunity for hearing.

WHEREFORE, the Court makes the following:

## CONCLUSIONS OF LAW

1. Petitioners Peralta Federation of Teachers, Local 1603, American Federation of Teachers, AFL-CIO and Peralta Part-Time Teachers Association have properly brought this proceeding pursuant to Education Code Section 13084.5 on behalf of employees of the Peralta Community College District who are members of either Petitioning Organization.

2. On July 1, 1971, Edward A. Walker became tenured as to 40 percent of a full-time teaching position.

3. On July 1, 1971, Dr. Virginia

Franklin became tenured as to 31 percent of a full-time teaching position.

4. On July 1, 1971, Gertrude Y. Fator became tenured as to 50 percent of a full-time teaching position.

5. On July 1, 1973, Jeff Kerwin became tenured as to 50 percent of a full-time teaching position.

6. On July 1, 1974, Mark Greenside became tenured as to 50 percent of a full-time teaching position.

7. On July 1, 1972, Helen Thomas became tenured as to 50 percent of a full-time teaching position.

8. On July 1, 1972, Lisa Rubens became tenured as to 33-1/3 percent of a full-time teaching position.

9. Petitioners are entitled to the issuance of a Writ of Mandate directing that the Peralta Community College District and the Governing Board of the Peralta Community College District reclassify Edward A. Walker, Dr. Virginia Franklin, Gertrude Y. Fator, Jeff Kerwin, Mark Greenside, Helen Thomas and Lisa Rubens as part-time tenured employees within ten (10) days after the service of notice of entry of judgment.

10. Leroy Votto, Dr. Wei Ren Feng, Gerald Suminiski, David R. Fielder and Dr. Brenda Schildgen are part-time probationary employees of Respondent Community College District, but there have been laches on the part of said persons whereby the Respondents have been prejudiced.

11. Petitioners are entitled to the issuance of a Writ of Mandate, directing the Respondents to reclassify Leroy Votto, Dr. Wei Ren Feng, Gerald Suminiski, David R. Fielder and Dr. Brenda Schildgen as part-time probationary employees of the Peralta Community College District and, within ten (10) days after the service of notice of entry of judgment herein either employ said persons as part-time regular employees or give said persons written notice that his or her services will not be required for the ensuing school year stating the reasons therefor in the manner provided for in Subdivision (a) of Section 13443 of the Education Code and afford such persons a hearing if a hearing is requested. Upon the giving of such notice, all time periods and deadline dates prescribed in Education Code Section 13443 shall be coextensively extended.

12. Petitioners are not entitled to a Writ of Mandate for pro-rata pay.

13. Petitioners are entitled to their costs of suit.

## SPECIAL FINDINGS OF FACT

1. The District's planning with respect to budgeting and course offerings has relied and continues to rely upon the use of hourly, part-time (temporary) employees at rate of compensation established by the Board of Trustees. In this respect:

a. During the school year 1974-75, the District spent $2,074,572 for the costs of providing temporary instructors. If such instructors were paid pro-rata pay, this cost would have been $4,846,530, an increase of $2,771,958. The latter

figure constitutes 11.4% of the total 1974-75 district budget of $24,301,635.

b. Such funds are not available from any source.

2. The District finds it necessary to change course offerings constantly in response to such factors as the general economy. Within the confines of a single school year, it may be necessary to add and delete courses by reason of such changing community demand. The California layoff statutes (Education Code Sections 13443 and 13447) are inadequate to make these adjustments because such proceedings, which must be conducted in March to be effective at the end of any given school year, occur at a time when it is not possible to foresee the specific changes in demand which will occur during the following school year.

3. The compensation paid by the District ($13.86 per hour) to temporary instructors is comparable to and competitive with practices in the Contra Costa, San Jose, West Valley, South County (Chabot) and Fremont/Newark (Ohlone) Community College Districts. However, College of San Mateo day school and College of Marin pay temporary teachers on a pro-rata basis.

4. All of the persons for whom relief is sought in this lawsuit were employed pursuant to written terms and conditions which stated that such employment was temporary. Each of such persons agreed to be employed as a temporary employee. Each of such persons further agreed to be paid at the hourly rate applicable to temporary employees.

5. A rational basis exists for the District's practice of employing temporary, certificated employees who are paid on a less-than-pro-rata basis as compared to regular or contract employees.

SPECIAL CONCLUSIONS OF LAW

1. No provisions of law contained in California statutes, federal statutes or the California or federal Constitutions requires Respondent school district to pay certificated employees, employed for not to exceed 60% of the hours considered a full-time assignment, an amount which bears the same ratio to the amount provided full-time employees as the time actually served by such part-time employees bears to the time actually served by full-time employees of the same grade or assignment. Further, the district's pay practices are permitted under Education Code Sections 13503.1 and 13506.

2. This action is not a proper class action.

DATED: July 25, 1975

/s/ Zook Sutton
Judge of the Superior Court

APPROVED AS TO FORM:

VAN BOURG, ALLEN, WEINBERG,
WILLIAMS & ROGER

By /s/ Stewart Weinberg
Stewart Weinberg

APPROVED AS TO FORM:

RICHARD J. MOORE, County Counsel

By /s/Jon A. Hudak
Jon A. Hudak
Deputy County Counsel

## RELEVANT CALIFORNIA STATUTES

Introductory note: On April 30, 1977, while this litigation was in progress, a recodification of the California Education Code became effective, which resulted in the renumbering of all of the statutory sections relevant to this litigation. The California Supreme Court referred, for the sake of convenience, "to the Education Code of 1959 as it read just before its recodification effective April 30, 1977." See Opinion, supra this Appendix, at 2 n.1.

Where any confusion might otherwise result, petitioners have here reproduced sections of both the 1959 Code and of the Reorganized Code, and indicated dispositions and derivations, respectively, where applicable.

Every statutory section referred to in the sections below has not been reproduced; the California Education Code presents a veritable infinite regress of cross references, and rather than reproduce the entire Code, petitioners have selected the relevant sections.

### i. California Education Code of 1959

§ 13337 Classification of temporary employees [Disposition in Reorganized Code: § 87480]

Governing boards of school districts shall classify as temporary employees those persons requiring certification qualifications, other than substitute employees, who are employed to serve from day to day during the first three school months of any school term to teach temporary classes not to exist after the first three school months of any school term or to perform any other duties which do not last longer than the first three months of any school term, or to teach in special day and evening classes for adults or in schools of migratory population for not more than four school months of any school term. If the classes or duties continue beyond the first three school months of any school term or four school months for special day and evening classes for adults, or schools for migratory population, the certificated employee, unless a permanent employee, shall be classified as a probationary employee. The school year may be divided not more than two school terms for the purposes of this section.

In any district, the governing board may, to prevent the stoppage of school district business when an actual emergency arises and persons are not immediately available for probationary classification, make an appointment to a position

on a temporary basis for a period not to exceed 20 working days. The person so appointed shall be deemed to be a temporary employee who is employed to serve from day to day. Service by a person in such an appointment on a temporary basis shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a permanent employee of a school district.

§ 13337.5 Employment of certain temporary employees; classification [Disposition: § 87482]

Notwithstanding the provisions of Section 13337, the governing board of a school district maintaining a community college may employ as a teacher in grade 13 or grade 14, for a complete school year but not less than a complete semester or quarter during a school year, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees for grades 13 and 14 during a particular semester or quarter because of the higher enrollment of students in those grades during that semester or quarter as compared to the other semester or quarter in the academic year, or because a certificated

employee has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

Such employment may be pursuant to contract fixing a salary for the entire semester or quarter.

No person shall be so employed by any one district for more than two semesters or quarters within any period of three consecutive years.

Notwithstanding any other provision to the contrary, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for permanent employees having comparable duties shall be classified as a temporary employee, and shall not become a probationary employee under the provisions of Section 13446.

§ 13446 Dismissal of temporary employees

Governing boards of school districts may dismiss temporary employees requiring certification qualifications at the pleasure of the board. A temporary employee

who is not dismissed during the first three school months, or in the case of migratory schools during the first four school months of the school term for which he was employed and who has not been classified as a permanent employee shall be deemed to have been classified as a probationary employee from the time his services as a temporary employee commenced.

ii. California Education Code (Reorganized)

§ 87480 Classification of temporary employees [Derivation: 1959 Code, § 13337]

Governing boards of community college districts shall classify as temporary employees those persons requiring certification qualifications, other than substitute employees, who are employed to serve from day to day during the first three school months of any school term to instruct temporary classes not to exist after the first three school months of any school term or to perform any other duties which do not last longer than the first three school months of any school term, or to instruct in special day and evening classes for adults or in schools of migratory population for not more than four school months of any school term. If the classes or duties continue beyond the first three school months of any school term or four school months for special day and evening classes for adults, or schools for migratory population, the certificated employee, unless a regular employee, shall be classified as a contract employee. The school year may be divided into not more than two school terms for the purposes of this section.

In any district, the governing board may, to prevent the stoppage of district business when an actual emergency arises and persons are not immediately available for contract classification, make an appointment to a position on a temporary basis for a period not to exceed 20 working days. The person so appointed shall be deemed to be a temporary employee who is employed to serve from day to day. Service by a person in such an appointment on a temporary basis shall not be included in computing the service required as a prerequisite to attainment of, or eligibility to, classification as a regular employee of a community college district.

§ 87482 Employment of certain temporary employees; classification [Derivation: § 13337.5]

Notwithstanding the provisions of Section 87480, the governing board of a community college district may employ as an instructor in grade 13 or 14, for a complete school year but not less than a complete semester or quarter during a school year, any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees for grades 13 and 14 during a particular semester or quarter

because of the higher enrollment of students in those grades during that semester or quarter as compared to the other semester or quarter in the academic year, or because a certificated employee has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

Such employment may be pursuant to contract fixing a salary for the entire semester or quarter.

No person shall be so employed by any one district for more than two semesters or quarters within any period of three consecutive years.

Notwithstanding any other provision to the contrary, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under the provisions of Section 87604.

§ 87604 Employment

The governing board of a community college district shall employ each certificated person as one of the following: contract employed, regular

employee, or temporary employee.

§ 87740 Cause, notice, and right to hearing required for dismissal of probationary employee [Derivation: § 13443]

(a) No later than March 15 and before an employee is given notice by the governing board that his services will not be required for the ensuing year, the governing board and the employee shall be given written notice by the superintendent of the district or his designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that such notice be given to the employee, and stating the reasons therefor.

If a contract employee has been in the employ of the district for less than 45 days on March 15, the giving of such notice may be deferred until the 45th day of employment and all time periods and deadline dates herein prescribed shall be coextensively extended.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties; however, the violation of this requirement of confidentiality, in and of itself, shall

not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him for the ensuing year. A request for a hearing must be in writing and must be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified therein, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his failure to do sc shall constitute his waiver of his right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that: (1) the respondent shall file his notice of defense, if any, within five days after service upon him of the accusation and he shall be notified of such five-day period for filing in the accusation; (2) the discovery authorized by Section 11507.6 of the Government Code shall be available

only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate; and (3) the hearing shall be conducted by a hearing officer who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the students thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the hearing officer shall be binding on the governing board or on any court in future litigation. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the hearing officer, shall be paid by the governing board from the district funds. The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section, as may be necessary to effectuate this section.

(d) The governing board's determination not to reemploy a contract employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and the students thereof and provided that cause shall include termination of services for the reasons specified in Section 87743. The decision made after the hearing shall be effective on May 15 of the year the proceeding is commenced.

(e) Notice to the contract employee by the governing board that his service will not be required for the ensuing year, shall be given no later than May 15.

(f) If a governing board notifies a contract employee that his services will not be required for the ensuing year, the board shall, within 10 days after delivery to it of the employee's written request, provide him with a statement of its reasons for not reemploying him for the ensuing school year.

(g) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(h) In the event that the governing board does not give notice provided for in subdivision (e) of this section on or before May 15, the employee shall be deemed reeemployed for the ensuing school year.

(i) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Government Code Section 11524, the dates prescribed in subdivisions (c), (d), (e) and (h) which occur on or after the date of granting the continuance shall be extended for a period of time equal to such continuance.

§ 87742. Dismissal of temporary employees [Derivation: § 13445]

Governing boards of community college districts may dismiss temporary employees at any time at the pleasure of the board.

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE
APPEALS BOARD

In the Matter of:

TERRENCE LAMB
(Claimant)
P.O. Box 3147
Napa, California

BENEFIT DECISION
Case No. 78-7212

S.S.A. No. 567-60-2598

NAPA COMMUNITY COLLEGE DISTRICT
(Employer)
Napa Vallejo Highway
Napa, California

EMPLOYMENT DEVELOPMENT DEPARTMENT

Office of Appeals No. OAK-4P-15887-2

The Department appealed from that portion of the decision of the administrative law judge which held that claimant Lamb was entitled to unemployment insurance benefits.

STATEMENT OF FACTS

We have carefully and independently reviewed the transcript and exhibits in this case, and have considered the contentions raised on appeal and in written argument. We adopt the statement of facts as our own.

REASONS FOR DECISION

We adopt as a part of our reasons for decision the first paragraph of the administrative law judge's reasons for decision.

Claimant Lamb has "reasonable assurance" of returning to teach in the fall. He had repeatedly returned to teach in the fall following the summer recess in the past. The fact that his class could be cancelled for insufficient enrollment does not negate this conclusion.

DECISION

The portion of the decision of the administrative law judge on appeal is reversed. Benefits are denied as determined by the Department.

RICHARD H. MARRIOTT

HARRY K. GRAFE

HERBERT RHODES

063-07238
DATE MAILED: DEC 19 1978

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1979

**No. 79-550**

PERALTA FEDERATION OF TEACHERS, LOCAL 1603,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,
*Petitioner,*

vs.

PERALTA COMMUNITY COLLEGE DISTRICT,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of California**

## RESPONDENT'S BRIEF IN OPPOSITION

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1979

No. 79-550

PERALTA FEDERATION OF TEACHERS, LOCAL 1603,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,
*Petitioner,*

VS.

PERALTA COMMUNITY COLLEGE DISTRICT,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of California**

## RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Peralta Community College District respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the California Supreme Court's Decision in this case. That opinion is reported at 24 Cal.3d 369, 155 Cal.Rptr. 679 and 595 P.2d 105.

## OPINIONS BELOW

The opinion of the Supreme Court of California, reversing the Superior Court for the County of Alameda, is reported at 24 Cal.3d 369, 155 Cal.Rptr. 679, and 595 P.2d

105. That opinion is set forth in the Appendix to the Petition for Writ of Certiorari[1] at p. 2.

The April 25, 1977 opinion of the Court of Appeal of the State of California, which is unreported,[2] is set forth in the Appendix to the Petition at p. 62.

The July 25, 1975 Judgment of the Superior Court is unreported. It appears in the Appendix to the Petition at p. 62.

The Superior Court's July 25, 1975 Order for the Issuance of a Peremptory Writ of Mandate is unreported. It is set forth in the Appendix to the Petition at p. 65.

The Superior Court's July 25, 1975 Statement of Findings of Fact and Conclusions of Law is unreported. It is set forth in the Appendix to the Petition at p. 67.

## JURISDICTION

The judgment of the Supreme Court of the State of California was entered on May 25, 1979, and the Order of that Court denying (without opinion) Petitioners' timely request for a rehearing was filed on July 6, 1979 (Appendix to the Petition at p. 1).

Petitioner[3] seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). As shown more fully

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[1]Hereinafter "Petition."

[2]The opinion of the Court of Appeal was superseded by the granting of a hearing by the California Supreme Court (California Rules of Court No. 976(d)) and may not be cited by a court or party as authority except under certain limited conditions (Rule 977).

[3]The Petitioner is set forth in the caption of the Petition as "PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al." The Petitioner subsequently refers to certain "individual petitioners before

below, this Court does not have jurisdiction over this matter inasmuch as the issues which Petitioner now seeks to raise were not raised, preserved and decided in the courts below.

## QUESTIONS PRESENTED

1. Did the Petitioner raise and preserve, and did the California Supreme Court decide, the constitutional question(s) or issue(s) which it now seeks to have heard in this Court, thus giving this Court jurisdiction under 28 U.S.C. § 1257(3)?

2. Does the exclusion of temporary part-time teachers from a statutory tenure and pro rata pay system burden a suspect class or infringe fundamental constitutional rights so as to require application of a strict scrutiny standard under the Equal Protection or Due Process Clauses?

3. Does the exclusion of temporary part-time teachers from the statutory provisions for tenure and pro rata pay meet the minimal rational basis standard required for economic and general social legislation?

---

this Court" (Petition, at p. 6). For the purpose of this Brief in Opposition Respondent is proceeding on the belief that the Peralta Federation of Teachers, Local 1603, AFT, AFL-CIO, is petitioning on behalf of those of its members who are part-time instructors with 60% or less of a normal teaching load who were first hired by the Respondent subsequent to November 8, 1967 and were thus aggrieved by the Decision of the California Supreme Court in the instant case. The Petitioner will generally be referred to in the singular herein as the "Petitioner" or the "Federation."

The Respondents before the California Courts were the Peralta Community College District and the Governing Board of the Peralta Community College District. Inasmuch as the Governing Board and the District are, for all relevant legal purposes, one and the same they will be referred to in the singular herein as the "Respondent" or the "District."

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

*United States Constitution, Fourteenth Amendment:*

> Section 1 . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*28 U.S.C. § 1257*

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

*California Education Code (Reorganized)*[4] Section 87482 [Formerly Section 13337.5]:

> Notwithstanding the provisions of Section 87480 [13337], the governing board of a community college district may employ as an instructor in grade 13 or 14, for a complete school year but not less than a complete semester or quarter during a school year,

---

[4]Effective April 30, 1977 the California Legislature reorganized the Education Code. Former Education Code § 13337.5 is now reorganized Education Code § 87482. This Brief will use dual Education Code citations with the former Code section in [brackets], where applicable. All statutory references, unless otherwise indicated, are to the California Education Code.

any person holding appropriate certification documents, and may classify such person as a temporary employee. The employment of such persons shall be based upon the need for additional certificated employees for grades 13 and 14 during a particular semester or quarter because of the higher enrollment of students in those grades during the semester or quarter as compared to the other semester or quarter in the academic year, or because a certificated employee has been granted leave for a semester, quarter, or year, or is experiencing long-term illness, and shall be limited, in number of persons so employed, to that need, as determined by the governing board.

Such employment may be pursuant to contract fixing a salary for the entire semester or quarter.

No person shall be so employed by any one district for more than two semesters or quarters within any period of three consecutive years.

Notwithstanding any other provision to the contrary, any person who is employed to teach adult or community college classes for not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under the provisions of Section 87604 [13446].

## STATEMENT OF THE CASE

The individual persons represented by Petitioner[5] before this Court are temporary part-time teachers and members of petitioner Federation who were initially hired after November 8, 1967[6] by the Peralta Community College

[5]Hereinafter collectively referred to as the "temporary part-time teachers" or the "temporaries."

[6]The effective date of the last paragraph of § 87482 [13337.5].

District, a local governmental entity which operates five community colleges in Alameda and Plumas Counties, California pursuant to an elaborate body of California statutes which determine the structure, program, employment requirements, and general governance of such districts.

The temporary part-time teachers all work for "not more than 60 percent of the hours per week considered a full-time assignment for regular employees having comparable duties" and therefore, pursuant to the last paragraph of § 87482 [13337.5] and the California Supreme Court's decision in this case (Appendix to Petition, at p. 14), must be *initially* classified as temporary employees. They are *not* prohibited from advancing to a more permanent status (i.e., as "contract" [probationary] or "regular" [tenured] employees) and the California Supreme Court specifically found that § 87482 [13337.5] does "not . . . preclude an otherwise authorized *subsequent* change from temporary status." (See Appendix to Petition, at p. 14.)[7] As temporary employees they were specifically excluded from the provisions of former Education Code § 13503.1 which mandated pro rata pay for part-time regular and contract employees.[8] Thus, subject to the collective bargaining proce-

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[7]Petitioner's unqualified assertion (Petition, at p. 6) that temporary part-time teachers are forever barred from attaining tenured status as community college teachers is curious considering the quoted language of the California Supreme Court. The California Supreme Court's interpretation of the last paragraph of § 87482 [13337.5] is that it merely requires the *initial* classification of 60%-and-under part-time instructors as temporary employees and does not preclude their *subsequent* change from temporary status.

[8]Section 13503.1 was omitted from the statutory provisions governing community college districts in the reorganized Education Code. Former § 13503.1 provided, in relevant part:

". . . In fixing the compensation of part-time employees, governing boards shall provide an amount which bears the same

dure of the Educational Employment Relations Act,[9] California community college districts have virtually unlimited authority to establish pay scales for temporary certificated personnel, which pay scales need bear no relation to pay scales for other certificated employees or classified (i.e., non-professional) employees. Temporary part-time teachers as found by the trial court below (see Appendix to Petition, at p. 69) ". . . can be removed without notice, cause or hearing," and, of course, need not be rehired by a district at the end of their employment contracts.[10] Normally, employment as a "contract" teacher leads to tenured employment as a "regular" teacher, which employment cannot be terminated by a community college district absent good cause.

In 1974, several persons (including the Federation) brought this suit, charging, *inter alia*, first that the statutory scheme of which § 87482 [13337.5] was a part did not prevent 60%-or-under temporary teachers from achieving contract or regular status (and thus to be denied tenure

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ratio to the amount provided full-time employees as the time actually served by full-time employees of the same grade or assignment. This section shall not apply to any person classified as a temporary employee under Section . . . 13337.5 . . . ."

The statutory provision now applicable to temporary certificated employees salary is § 87804 [13508]:

"The governing board of a community college district may employ such temporary employees of the district as it deems necessary and shall adopt and make public a salary schedule setting the daily or pay period rate or rates for temporary employees. . . ."

[9]California Government Code §§ 3540 *et seq.* (not applicable in the instant case).

[10]Part-time regular and contract teachers would normally be persons employed for more than 60% of the number of hours considered a full-time load. Such teachers have tenure and pro rata pay rights analogous to those of their full-time counterparts.

and equal pay), and second that if the statute did so provide, it would violate the equal protection clause of the Fourteenth Amendment.[11]

Although the trial court upheld Petitioner's claim regarding tenured status, it expressly rejected Petitioner's equal protection argument with respect to pro rata pay (Appendix to Petition, at pp. 71 and 77) and based the partial grant of relief upon a statutory interpretation which the California appellate courts were to reject.

The California Court of Appeals described the trial court proceedings in the following passage adopted by the Supreme Court in its opinion:

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[11]In the initial petition to the Alameda County Superior Court it was alleged:

> "XII. The establishment of a classification of hourly or part-time employees paid at less than pro rata rates is arbitrary and unreasonable.
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> • • •
>
> "XIV. The compensation of hourly part-time employees at a rate of pay which is not a pro rata rate of pay when compared with the contract employees is a denial of the equal protection of laws guaranteed under the United States and California Constitutions. (Reporter's Transcript, pp. 5-6)."

This petition was subsequently amended by the addition of a Second Cause of Action which, in part, stated:

> "II. The [various petitioners] have been denied the statutory protection of the Education Code and the *due process* clauses of the United States and California Constitutions, in that the practice of perpetuating persons on a part-time-hourly basis denies those persons the benefit of the Teacher Tenure Laws of the Education Code of the State of California. . . ." (Reporters Transcript, p. 165) [emphasis added]

This latter allegation is not relevant to the instant Petitioner inasmuch as the statutory scheme at issue is attacked on *equal protection* grounds only. References to due process in the Petition relate solely to: (1) potential issues which Petitioner admits it has no standing to raise and (2) Petitioner's contention that temporary part-time teachers have an independent right to procedural due process in the absence of pre-existing property rights.

> "Twelve teachers who have been employed by Peralta Community College District (supported by plaintiff federation of which they are members) sought writ of mandate to compel the district and its governing board to grant them tenured status and to compensate them at a certain rate of pay. The trial court granted the writ to classify some of the teachers as permanent and others as contract employees, but denied the petition as it relates to pay. The district appeals from that portion of the judgment which has to do with classification and the teachers cross-appeal from the part which concerns compensation."
>
> (Appendix to Petition, at p. 4.)

In accordance with another California Supreme Court case involving the same statute, as well as the same defendant (then known by a slightly different name), *Balen v. Peralta Junior College District*, 11 Cal.3d 821, 114 Cal. Rptr. 589, 523 P.2d 629 (1974), the California Supreme Court held in its opinion below that those part-time teachers who had been hired before a 1967 amendment to § 87482 [13337.5] had already attained non-temporary status, and therefore that the statute—which the California Supreme Court had concluded in *Balen* was not intended to be retroactive—did not alter this. Affirming the Court of Appeal's decision, the Court reversed that part of the trial court's decision that ordered the district to classify as contract or regular the temporary part-time teachers employed after November 8, 1967, the effective date of the statutory change.[12] (Appendix to Petition at pp. 25 and 60.)

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[12]The last paragraph of § 87482 [13337.5] was interpreted by the California Supreme Court as imposing only two restrictions on part-time teacher classification. The first, that the teacher "shall be classified as a temporary employee" was construed by the Court to "apply

As recognized by the Petitioner (Petition, at p. 11), "[n]either the California Court of Appeal nor the Supreme Court of California adverted to the constitutional claim in their opinions." It could not have been otherwise since the "constitutional claim" which petitioner now seeks to raise was never properly before these Courts. Petitioner's claim that it has preserved *the* constitutional issue which it now seeks to have heard by this Court by urging an equal protection claim in its brief before the California Court of Appeal is totally without merit.

In its arguments to both the California Court of Appeal and the California Supreme Court Petitioner presented its case almost exclusively on the basis of statutory interpretation, which interpretation was rejected by both Courts. The Petitioner contended that, under its interpretation of the relevant sections of the California Education Code, its members were statutorily entitled to non-temporary status (i.e., "contract" or "regular" status, depending upon their length of service with the District) and that *as* contract or regular employees they have a constitutional right to pro rata pay. When the California Court of Appeal and Supreme Court both concluded that the part-time teachers were properly classified as "temporary" under the applicable California statutes their labors were at an end.

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only to *initial* classification and not to preclude an otherwise authorized *subsequent* change from temporary status." Appendix, *infra*, at p. 14 (original emphasis). The second limitation, that the part-time employee not be classified as probationary "under the provisions of Section 13446" eliminated only one possible alternate basis for subsequent reclassification.

However, the Court went on to examine other statutes which arguably mandated subsequent reclassification of a part-time teacher initially classified as temporary pursuant to § 87482 [13337.5], only to conclude "we find no such statute." Appendix to Petition, at pp. 14-15.

Neither Court ever reached any constitutional issue because, as posed to them by petitioner,[13] the constitutional issue was inextricably linked to a statutory determination that the part-time teachers before the courts were not "temporary" employees. When the California Supreme Court decided that the part-time teachers were "temporary" employees the only constitutional issue before it became moot.

When Petitioner belatedly recognized its restricted framing of the constitutional issue on appeal it sought a rehearing in the California Supreme Court. Its Petition for Rehearing was denied without opinion on July 6, 1979.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I

### SUMMARY OF ARGUMENT

This Court does not have jurisdiction under 28 U.S.C. § 1257(3) on account of the fact that the constitutional issues which Petitioner now seeks to have heard were not properly presented to the California courts. While admitting, *arguendo*, that some constitutional issue or issues were raised in the trial court, an examination of the record below clearly shows that such issue or issues were not preserved in the California appellate courts and were not decided or addressed in the opinions of either the California Court of Appeal or the California Supreme Court.

Respondent's argument shows that the only constitutional issue presented to the California appellate courts

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[13]As shown more fully below, the petitioner affirmatively disclaimed the very constitutional equal protection issue it now seeks to resurrect.

was a claim that under the equal protection clause non-temporary part-time teachers have a right to pro rata pay. When the California appellate courts construed the applicable statutory provisions and determined that the proper status of the teachers before the bench was in fact temporary, the constitutional question as presented to the courts simply became moot, and therefore was not addressed.

It was not until after the decision of the California Supreme Court was filed and published that the Petitioner recognized the fact that the broad constitutional issues which it now seeks to have heard had not been presented to the California appellate courts. A Petition for Rehearing was filed in the California Supreme Court which sought to address these issues, but under controlling California law, the attempt to belatedly raise such issues was untimely. The Petition for Rehearing was denied without opinion.

This Court has clearly stated on numerous occasions that a petition for a writ of certiorari to a state court will not be granted where the federal or constitutional issues sought to be addressed were not first raised, preserved and decided by the state courts below. This is a jurisdictional requirement under 28 U.S.C. § 1257(3). On this ground alone the Petition should be denied.

Furthermore, Petitioner has failed to present a *prima facie* case of any constitutional violation. This statutory classification does not violate the equal protection clause as it bears a rational relationship to permissible governmental objectives. The standard of strict scrutiny does not apply as temporary part-time teachers are not a suspect

class, nor does the statutory scheme limit the exercise of any fundamental constitutional rights. Moreover, any contention that temporary part-time teachers have been denied the benefits of substantive or procedural due process must fail because none have been deprived of life, liberty or property.

Neither tenure nor pro rata pay amounts to a fundamental right of constitutional dimensions. There is no constitutional right to governmental employment *per se,* and the due process protections relating to tenure come into operation only where tenure has already been earned. There is no independent right to the accompanying due process protections in the absence of tenure itself.

Petitioner further alleges a possible chilling effect upon First Amendment rights to freedom of speech. However, it has alleged no specific conduct in which its members wish to engage which would be circumscribed by the statutory scheme at issue. As there is also no allegation that the statutory scheme has been applied to any temporary part-time teacher with the effect of limiting free speech, no chilling of First Amendment freedoms has been established.

## II

## THE COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C. § 1257(3)

### A. The Petitioner Failed to Argue the Points It Now Seeks to Raise Before Either the California Court of Appeal or the California Supreme Court

#### 1. Petitioner's Equal Protection Claim Was Predicated Upon Its Claim to Tenured Status for Its Temporary Teachers

Jurisdiction to grant the Petition for Certiorari and review the decision below is based upon Petitioner's assertion that plaintiffs below[14] presented *and* preserved an equal protection claim which the California Supreme Court, in its opinion of May 25, 1979, improperly failed to address. An examination of the record in this case and the several briefs filed by plaintiffs below clearly shows that this assertion is without merit. The only constitutional claim made by plaintiffs in their appeal was that under California law they had achieved regular or contract status and therefore *as* regular or contract instructors they had a constitutional right to be paid on a pro rata basis with their full-time counterparts. No equal protection claim with regard to *non-tenured* part-time instructors was ever raised or argued on appeal prior to the Petition for Rehearing to the California Supreme Court which was denied without opinion. Further, as will be shown below, the plaintiffs clearly disclaimed the issue they now seek to raise at the appellate level.

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[14]Petitioner herein was one of the plaintiffs before the California courts. For convenience, this portion of the Brief in Opposition will use the designation "plaintiffs" to refer to the parties aligned with Petitioner who were before the California courts.

Throughout the appellate process, plaintiffs at all times linked their constitutional equal protection claim of entitlement to pro rata pay with their statutory claim to contract or regular status under § 87482 [13337.5]. Plaintiffs admitted that the broad equal protection issue which they now seek to raise "was not briefed or discussed in the petition for hearing before [the California Supreme] Court" but assert that this claim was somehow raised *and* preserved, and was therefore before the Courts (Petition for Rehearing to California Supreme Court, p. 2). Admitting *arguendo* that an equal protection claim regarding *all* part-time faculty was raised before the Alameda County Superior Court, as shown below, it was nowhere preserved on appeal.

**2. Proceedings Before the California Court of Appeal**

In their Petition for Rehearing to the California Supreme Court (at pp. 3-4) plaintiffs asserted that such issue was raised before the Court of Appeal in their "Opening Brief of Cross-Appellants" at pp. 36-38,[15] and later in their Closing Brief at some undisclosed location. A reading of the briefs indicate that no such issue was ever before the Court of Appeal and certainly could not have been preserved for hearing by the California Supreme Court or this Court.

**(a) The Constitutional Claim on Appeal for Pro Rata Pay Was for Non-Temporary Staff Only**

Throughout their appeal, the plaintiffs argued that, under this interpretation of § 87482 [13337.5], they are

[15]Petitioner also references this passage in its Petition to this Court, at pp. 11-12.

"tenured" employees and that as a necessary consequence of such tenured status they are entitled to receive pro rata pay.[16] In the Opening Brief of Cross-Appellants (at pp. 30-31) they stated:

> "While finding that Petitioners [i.e., plaintiffs] had received tenure on a part-time basis, the trial court inconsistently found they were not entitled to pro rata pay. *This portion of the brief shows that the necessary consequence of tenuring is pro rata pay* and that any other result contravenes the District's own salary schedule, and the legislative purpose, and is suspect under the United States and California Constitutions.
>
> • • •
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> "The defect in the findings of the trial court upholding this scheme is that the findings were aimed solely at distinguishing between the compensation which a Dis-

[16]In their Opening Brief plaintiffs stated the "Nature of the Case" to the Court of Appeal as follows:

> "This matter is here on an appeal and cross-appeal from a Superior Court judgment in part granting and in part denying a Petition for Writ of Mandate filed by several Peralta Community College District employees and employee organizations (hereinafter "Petitioners").
>
> "The *appeal* raises issues regarding the tenure rights of a certain class of part-time Community College District teachers, and the *cross-appeal* raises issues regarding the appropriate rate of pay such teachers are to receive.
>
> " • • •
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> "While granting relief on the 'tenure cause of action' the trial court declined to grant these same Petitioners pay pro rata with that of tenured employees. *Petitioners* filed a Cross-Appeal from that portion of the judgment which failed to accord them pro rata pay and *argue here that* the District's salary schedule, by which it is bound, and the statutory scheme are such that *once an employee is tenured as to a part-time position the automatic consequence is a right to pro rata pay.* Not only is this result mandated by the schedule and by Education Code § 13503.1, but *any other construction would raise serious constitutional problems.*" (Opening Brief of Cross-Appellants and Reply Brief of Respondents, pp. 1-2.) [Emphasis added.]

> trict might rationally pay true temporaries as opposed to what it must pay contract or regular employees. The findings fail, however, to address themselves to *the question of the compensation which is due those part-time instructors who*, by virtue of the principles enunciated in the court's other findings, *cease to be temporary*. Are they to be consigned to the anomalous position of tenured teachers paid at temporary rates, or are they to be paid the pro rata equivalent of full-time teachers? *This is the question* addressed in this portion of this brief." [Emphasis added.]

Immediately following this statement of the issue on their cross-appeal, the plaintiffs' main argument is stated as follows: "(A) Under The Statute Pro Rata Pay Automatically Follows From Tenure" (at p. 31).

The final argument in the plaintiffs' Opening Brief is set forth as follows: "(C) Any Construction Which Permits Tenured Part-Timers To Receive Less Than Pro Rata Pay Would Be Inconsistent With The Legislative Intent And Arbitrary." (At p. 34.) Subsumed within this argument are the only portions of plaintiffs' appellate briefs which are specifically referenced in support of their Petition for Rehearing to the California Supreme Court and (on this issue) in their Petition to this Court. On page 36 of their Opening Brief to the California Court of Appeal plaintiffs maintained that: "[t]he District's refusal to provide pro rata pay to all part-time persons is irrational; it creates a classification that bears no rational relationship to the statutory function." Directly thereafter, however, the plaintiffs specifically denominate the classification referred to as "the temporary classification." The plaintiffs then go on (at pp. 37-38) to list the qualifica-

tions of a number of individual plaintiffs and complain that "all of these individuals are refused pay on a pro rata basis simply because the District, in the absence of any statutory authority chooses to classify them as 'part-time temporary' employees. . . ."

Thus in their Opening Brief to the California Court of Appeal, the plaintiffs asserted a claim that they are entitled to pro rata pay *not* because they are part-time teachers *per se,* but rather because they are improperly classified as *temporary* teachers while they should have been classified in a contract or regular status and as such should be entitled to pro rata pay. In this, and in all subsequent briefs prior to their Petition for Rehearing to the California Supreme Court, plaintiffs have never asserted that all part-time faculty are entitled to pro rata pay, but rather have maintained that, under their interpretation of § 87482 [13337.5], they should be classified as part-time permanent faculty with tenure rights and, because of their non-temporary status, a constitutional entitlement to pro rata pay obtains.

**(b) Plaintiffs Affirmatively Disclaimed the Very Claim They Now Seek to Raise**

In their "Closing Brief of Cross-Appellants" to the California Court of Appeal the plaintiffs affirmatively disclaimed the claim which they now seek to assert. In that brief, plaintiffs focused the issues before the appellate courts as follows:

> "(1) These Petitioners do not ask all, or any temporary teachers be paid on a pro rata basis. *They ask only that contract and regular teachers who are part-time receive such pro rata pay . . . .*

> (2) This litigation does not involve all of the District's teachers which it has treated as temporary; rather, *the litigation involves only that portion of those teachers who have achieved contract or regular status.* . . ." (Closing Brief of Cross-Appellants, pp. 2-3) [Emphasis added.]

Later in this Brief, the plaintiffs state:

> *"The teachers before this Court are part-time contract and regular teachers,* and must be paid under the District's own schedule for contract and regular teachers." (Closing Brief of Cross-Appellants, p. 6)

Thus the plaintiffs framed the issue for the California Court of Appeal in such a manner as to abandon any claim that a person properly classified as temporary would be entitled to pro rata pay. Their assertion of a right to pro rata pay has always been conditioned upon their claimed status as non-temporary employees. When the California Court of Appeal found that part-time teachers hired pursuant to the provisions of the fourth paragraph of § 87482 [13337.5] are temporary employees, no further issue, constitutional or otherwise, was before that Court with regard to such employees' entitlement to pro rata pay under the issues on appeal as set forth by the plaintiffs herein.

In the Court of Appeals' decision in this case (originally reported at 69 Cal.App.3d 281, 138 Cal.Rptr. 144 [1977]), the Court concluded that former Education Code § 13503.1 requires pro rata pay for part-time *regular,* or *contract* teachers (in accordance with the contentions made by the plaintiffs in their appellate briefs) but that under § 87482 [13337.5] part-time teachers hired after November 8, 1967 did not advance to regular or contract status. The

Court of Appeal never reached the broad equal protection issue raised in the Petition for Rehearing to the California Supreme Court (and in the Petition for a Writ of Certiorari) concerning the entitlement of *all* part-time teachers to pro rata pay simply because that issue was not raised, briefed or argued on appeal.

### 3. The Petition for Rehearing to the Court of Appeal Never Addressed Equal Protection Arguments

Subsequent to the Court of Appeals' decision of April 25, 1977, the plaintiffs petitioned that Court for a rehearing. Their moving papers were entitled "Petition for Rehearing on Post-1967 Tenure." This Petition did not address the Court of Appeals' failure to reach the equal protection issue raised for the first time in the Petition for Rehearing to the California Supreme Court, but rather, sought a rehearing solely on (1) the question of statutory interpretation of § 87482 [13337.5] and (2) the effects of *Balen v. Peralta Junior College District, supra,* and *Ferner v. Harris,* 45 Cal.App.3d 363, 119 Cal.Rptr. 385 (1975) on this case. Nowhere in that Petition was the equal protection argument raised. Further, the prayer was "that a rehearing be had on [the two] points specified herein." (Petition for Rehearing on Post-1967 Tenure, p. 20).[17]

[17]It is inconceivable that plaintiffs could have failed to note that the California Court of Appeal totally omitted their supposed constitutional claim as to *temporary* teachers from its opinion if, in fact, they were asserting such a constitutional claim. The omission of this matter as a ground for rehearing can only be interpreted as conclusive proof that no broad constitutional claim (such as Petitioner now seeks to raise) was being asserted to the California appellate courts prior to the Petition for Rehearing to the California Supreme Court.

**4. Proceedings Before the California Supreme Court Were Limited to Petitioners' Status Under § 87482 [13337.5] and Their Rights If Found to Be Permanent Employees**

Following the Court of Appeals' denial of their Petition for Rehearing, the plaintiffs filed a Petition for Hearing in the California Supreme Court. In their Petition for Hearing, the plaintiffs stated:

> *"The sole issue raised by this Petition is whether the fourth (last) paragraph of Education Code § 13337.5 when adopted in 1967 created a class of permanently temporary community college teachers,* that is, teachers who may never achieve probationary (contract) or permanent (regular) status, although they are hired and rehired repeatedly and continuously over a period of many years." (Petition for Hearing, p. 2) [Emphasis added.]

An examination of their Petition for Hearing clearly shows that the issue brought by plaintiffs to the California Supreme Court is the same basic issue which was before the California Court of Appeals, viz: whether § 87482 [13337.5] authorizes community college districts to hire and maintain 60%-and-below part-time faculty as temporary employees, and the entitlement to pro rata pay for those part-time employees if they should be found to be contract or regular employees. Throughout their appeals in this case, the plaintiffs have always linked their claim of entitlement to pro rata pay to their claim that their employment status is other than temporary and have based their claim to non-temporary status on statutory rather than constitutional grounds. In determining that those per-

sons employed after the effective date of § 87482 [13337.5] are temporary employees neither the California Court of Appeal nor the California Supreme Court ever reached any constitutional issue since no such issue was ever raised on appeal by plaintiffs prior to their Petition for Rehearing to the California Supreme Court.

**B. Under California Law a Rehearing Will Not Be Granted on Points Newly Raised**

When the equal protection claim was presented to the California Supreme Court by way of a Petition for Rehearing, that Court properly denied the request to hear the newly discovered argument.

Witkin states the fundamental prohibition against raising new points on rehearing as follows:

> "The courts have on numerous occasions declared that they will not grant rehearings on points newly urged in the petition. It is the duty of counsel to see that all points are properly presented in the original briefs or argument, before submission. (*Pac. Finance Corp. v. Lynwood* (1931) 114 C.A. 509, 516, 300 P. 50, 1 P.2d 520 [quoting early case referring to this "most pernicious practice"]; *Prince v. Hill* (1915) 170 C. 193, 195, 149 P. 578; *Estate of Novotny* (1928) 94 C.A. 782, 790, 271 P. 923, 271 P. 58; *Mann v. Brison* (1932) 120 C.A. 450, 452, 7 P.2d 1110, 9 P.2d 257; *Estate of Edwards* (1932) 126 C.A. 152, 157, 14 P.2d 318, 15 P.2d 194; *Conner v. East Bay Mun. Utility Dist.* (1935) 8 C.A.2d 613, 619, 49 P.2d 982; *Estabrook Co. v. Ind. Acc. Com.* (1918) 177 C. 767, 771, 177 P. 848; *Ocean Park etc. Corp. v. Santa Monica* (1940) 40 C.A.2d 76, 87, 104 P.2d 668, 879; *Epperson v. Rosemond* (1950) 100 C.A.2d 344, 347, 223 P.2d 655, 224 P.2d 480 ["Appellants where they

> blew very hot in their briefs blow very cold indeed in their petition for rehearing"]; *Smith v. Crocker First Nat. Bank* (1957) 152 C.A.2d 832, 836, 314 P.2d 237; *People v. Mascotti* (1962) 206 C.A.2d 772, 779, 23 C.R. 846; see 5 Am.Jur.2d 412);" Witkin, *California Procedure, 2d Ed.* (1971) Appeal § 598.

The prohibition against raising new points on a petition for rehearing has been the California rule from the earliest possible time:

> "It was intimated by the Court on the argument, that on a rehearing the whole cause was open and either party might raise such objections and make such points, as he could have raised and made on the first argument. On reflection we think otherwise. A party should present his whole case on the first hearing, and ought not to be permitted to argue it by piece-meal. This is the practice in Louisiana, [citation] and, as a general rule, we approve of it." *Grogan v. Ruckle,* 1 Cal. 193, 197 (1850).

The California appellate courts have consistently refused to hear points on rehearing which were not presented at the earlier stages of the appellate process.[18]

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[18]*Kellogg v. Cochran,* 87 Cal. 192, 200, 25 P. 677 (1890) [". . . we will not grant a rehearing in order to consider points not made in the argument upon which the case was originally submitted . . . we cannot be expected to scrutinize the record for the purpose of discovering points which counsel have not taken the trouble to specify"]; *Dougherty v. Henarie,* 49 Cal. 686 (1875) ["The proper dispatch of the business of the Court requires that counsel should state the grounds on which they rely in their briefs, and not reserve other points to be set up in a petition for rehearing, after a decision of all the cause."]; *City of San Marino v. Roman Catholic Archbishop,* 180 Cal.App.2d 657, 679, 4 Cal.Rptr. 547 (1960) ["This point, not having been raised or argued in the City's opening or closing briefs or on oral argument, may not be considered on a petition for rehearing."]; *Blackman v. MacCoy,* 169 Cal.App.2d 873, 882, 338 P.2d 234 (1959) ["This contention was not set forth by appellant in his

Thus, where the plaintiffs failed to raise the issue of equal protection vis-a-vis part-time *temporary* employees before either the California Court of Appeal or the California Supreme Court until their final Petition for Rehearing, the California Supreme Court properly denied a rehearing on such issue.[19]

### C. This Court Has No Jurisdiction to Decide Federal Constitutional Issues Which Were Not Raised and Decided in the California Appellate Courts

Few propositions of law are more clear than the well-established jurisdictional rule that in cases arising in the state courts the U.S. Supreme Court can only review federal constitutional issues which were raised, preserved and decided below. In *Cardinale v. Louisiana*, 394 U.S. 437, 438-9, 22 L.Ed.2d 398, 89 S.Ct. 1161 (1969) the Court stated:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the

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briefs nor in oral argument, and will not be considered for the first time on a petition for rehearing"]; *City and County of San Francisco v. Pacific Bank*, 89 Cal. 23, 25, 26 P. 615 (1891) ["when counsel have once argued and submitted a cause for the decision of the court, it must be assumed that they have presented all the reasons upon which they rely for an affirmance or a reversal of the judgment. The court will not consider a petition for rehearing that attempts to discuss the case upon grounds which were not presented in the original argument or discussed in its opinion. (*Kellogg v. Cochran*, 87 Cal. 192)"]; *Pasadena Ice Company v. Reeder*, 206 Cal. 697, 705, 275 P. 944 (1929) ["The scope of such injunction was not brought into question upon this appeal until the presentation of the petition for rehearing and will not for that reason be given consideration thereof."]

[19]This was especially true in the instant case wherein, as shown above, the plaintiffs specifically tailored their presentation of issues on appeal to affirmatively exclude the very argument that they now seek to raise.

first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L.Ed. 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, *Miller v. Nicholls*, 4 Wheat 311, 315, 4 L.Ed. 578, 579 (1819), and since, e.g., *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.*, 360 U.S. 334, 342, n. 7, 3 L.Ed.2d 1280, 1286, 79 S.Ct. 1196 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-163, 89 L.Ed. 812, 817-819, 65 S.Ct. 573 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 84 L.Ed. 849, 851-852, 60 S.Ct. 670 (1940); *Whitney v. California*, 274 U.S. 357, 362-363, 71 L.Ed. 1095, 1100-1101, 47 S.Ct. 641 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201, 43 L.Ed. 665, 667-668, 19 S.Ct. 379 (1899); *Murdock v. City of Memphis*, 20 Wall 590, 22 L.Ed. 429 (1875).

"In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. . . . [i]n a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state

ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92, 17 L.Ed.2d 189, 87 S.Ct. 252 (1966), they should be given the first opportunity to consider them."

And in *McGoldrick v. Compagnie Generale Transatlantique, supra,* the Court stated:

"But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225, 72 L.Ed. 249, 252, 48 S.Ct. 87 [1927]: *Duignan v. United States*, 274 U.S. 195, 200, 71 L.Ed. 996, 1000, 47 S.Ct. 566 [1927]. In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. *Dewey v. Des Moines*, 173 U.S. 193, 43 L.Ed. 665, 19 S.Ct. 379 [1899]; *Keokuk &*

*H. Bridge Co. v. Illinois*, 175 U.S. 626, 633, 44 L.Ed. 299, 302, 20 S.Ct. 205 [1900]; *Whitney v. California*, 274 U.S. 357, 362, 363, 71 L.Ed. 1095, 1100, 1101, 47 S.Ct. 641 [1927]; *New York ex rel. Conn v. Graves*, 300 U.S. 308, 317, 81 L.Ed. 666, 672, 57 S.Ct. 466, 108 ALR 721 [1937].

"Like considerations, we think, require us to refuse to entertain such new grounds of attack as a support for a state judgment of invalidity based on an erroneous construction of the Constitution. In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, *or which, in the course of proceedings there, have been abandoned.*" (309 U.S. at 434-5.) [Emphasis added.]

As shown above, the only constitutional issue which was presented to the California appellate courts was whether, based upon the equal protection clause, part-time regular and contract teachers are entitled to be compensated on a pro rata basis proportionate to the amounts paid full-time employees. Even that issue was never reached by either the California Court of Appeal or the California Supreme Court on account of the fact that former Education Code § 13503.1 was dispositive of the issue (see Appendix to Petition, at pp. 56 and 21-22, respectively). Both California appellate courts apparently took plaintiffs at

their word that they were not making an equal protection claim on behalf of temporary part-time instructors.[20]

Subsequent to the decision of the California Supreme Court plaintiffs employed new counsel who attempted to raise the broad constitutional equal protection issue as to temporary employees. As shown above, this was too late under California law and likewise will not support this Court's jurisdiction under 28 U.S.C. § 1257(3). The situation here is analogous to *Herndon v. Georgia*, 295 U.S. 441, 79 L.Ed. 1530, 55 S.Ct. 794 (1935), wherein the Court stated:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule [21] is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. *Texas & P. R. Co. v. Southern P. Co.*, 137 U.S. 48, 54, 34 L.Ed. 614, 617, 11 S.Ct. 10 [1890]; *Loeber v. Schroe-*

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[20] "It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature." *Keokuk & Hamilton Bridge Co. v. Illinois, supra,* 175 U.S. at 634.

[21] The exception to this rule wherein an issue may first be raised on petition for rehearing when the court gives a statute an unanticipated new construction is obviously not applicable in the instant case. The basic statutory question at issue in this case (i.e., whether the fourth paragraph of § 87482 [13337.5] could be read independently or whether it could only be read in conjunction with the first three paragraphs of the section) had been warmly litigated throughout the State for several years by the two major California teachers organizations (of which Petitioner is an affiliate) opposing numerous local community college districts. The preceding litigation had provided no definitive answer from either the Superior Courts or the Courts of Appeal and *Peralta* was the first case to reach the California Supreme Court. The construction placed upon § 87482 [13337.5] by the California Supreme Court can in no way be said to have been unanticipated by the parties to this litigation. (Cf., *Herndon v. Georgia, supra* at 443-4.)

*der*, 149 U.S. 580, 585, 37 L.Ed. 856, 858, 13 S.Ct. 934 [1893]; *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181, 64 L.Ed. 213, 214, 40 S.Ct. 116 [1919]; *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 117, 67 L.Ed. 556, 563, 43 S.Ct. 288 [1923]; *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 454, 455, 68 L.Ed. 382, 387, 388, 44 S.Ct. 197 [1924], and cases cited." (295 U.S. at 443)

Since the California Supreme Court denied the Petition for Rehearing without opinion, the constitutional issues which petitioner now seeks to raise were never properly presented, and certainly were not decided below and this Court's jurisdiction fails.[22]

## III

## PETITIONER'S CONSTITUTIONAL CLAIMS ARE WITHOUT MERIT AS PRESENTED AND THEREFORE NEED NOT BE CONSIDERED FURTHER

Petitioner has failed to present a prima facie case of any constitutional violation. Rather, it has attempted to support its position with a collection of favorable language selected from cases involving three very different varieties of constitutional claims: equal protection, procedural due process, and substantive due process. In so doing, Petitioner has not met the standards of a prima facie case under any one of these theories. Any equal protection argument must fail because the standard of minimal rationality has not been met and temporary part-time teachers are not a suspect class entitled to a higher standard of equal protection scrutiny. Petitioner admits that it has not established a claim under procedural due process requirements as no

[22]See also *Pim v. St. Louis*, 165 U.S. 273, 274, 41 L.Ed. 714, 17 S.Ct. 322 (1897).

one has suffered a deprivation of any interest protected by the due process clause. Nevertheless, its Petition relies extensively on standards extracted from procedural due process cases. Finally, Petitioner presents no valid claim under substantive due process requirements as no "fundamental right" is limited by the statutory scheme. Thus, Petitioner has not set out the elements of a prima facie case under any constitutional provision.

### A. The Statutory Provisions In Question Do Not Deny Equal Protection Of The Laws

Petitioner's basic claim seems to be that the statutory provisions excluding temporary part-time teachers from tenure and pro rata pay violates the Equal Protection Clause of the Fourteenth Amendment. Equal protection guarantees that similarly situated individuals will be treated similarly, thus testing whether a legislative classification is properly drawn. This court has traditionally deferred as much as possible to legislatures in the establishment of proper lines for statutory classification. For the most part, review has been limited to a minimal standard of some conceivable rational relationship between the statutory provision and the governmental interest to be served. The standard for judging legislative classification is more demanding only where the classification itself involves some suspect criterion such as race or where the classification impinges on individuals in their exercise of fundamental constitutional rights.

#### 1. Basic Standards For Equal Protection

The standards for judicial review of a legislative classification are either a "rational basis" test used for classifica-

tions employed in economic and general social welfare legislation or "strict scrutiny" of classifications touching upon fundamental constitutional values or employing unconstitutional criteria. Under the rational basis test a classification is valid if it is shown to conceivably bear a rational relationship to a governmental interest and not be prohibited by the constitution. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55, 36 L.Ed.2d 16, 93 S.Ct. 1278, (1973) reh. den. 411 U.S. 959, 36 L.Ed.2d 418, 93 S.Ct. 1919 (1973). Under strict scrutiny the classification must be necessary to a compelling state interest for the statute to be upheld. *Loving v. Virginia*, 388 U.S. 1, 11, 18 L.Ed.2d 1010, 87 S.Ct. 1817, (1967). Strict scrutiny applies only in two categories of cases: first, where the classification controls the exercise of a fundamental constitutional right; second, where the classification distinguishes between persons on a suspect basis. Virtually all other classifications are judged on the rational basis standard. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 311-314, 49 L.Ed.2d 520, 96 S.Ct. 2562, (1976). As Petitioner does not allege that this case involves a suspect classification, and since no fundamental right is infringed by the statutory scheme, the rational basis standard of review must be applied.

As long as the legislature does not employ suspect criteria or burden fundamental rights, this Court has historically given great weight to legislative judgments concerning the terms of public employment, as part of a general policy of deferring to legislative judgments as to matters of economic and social welfare. Thus, this Court has upheld mandatory retirement from government service at age 50, ruling that classifications by age are not "suspect" or

of constitutional significance. *Massachusetts Board of Retirement v. Murgia, supra* at 313-314. Similarly, government employees may be classified in ways that could not be applied to the public generally such as on the basis of appearance or residence. *Kelley v. Johnson*, 425 U.S. 238, 248-249, 47 L.Ed.2d 708, 96 S.Ct. 1440 (1976); *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645, 646, 47 L.Ed.2d 366, 96 S.Ct. 1154 (1976). Regulation of employees must only be reasonably related to the efficient operation of governmental units or the pursuance of other legitimate governmental purposes as there is no fundamental right to governmental employment. *San Antonio Independent School District v. Rodriguez, supra; Dandridge v. Williams*, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970), reh. den. 398 U.S. 914, 26 L.Ed.2d 80, 90 S.Ct. 1684 (1970).

### 2. Temporary Part-Time Teachers Are Not A Suspect Classification Nor Are Their Fundamental Rights Infringed By The Statutory Scheme

Suspect classifications are limited to those based on race, religion, national origin and in certain specialized circumstances, gender and wealth. Obviously, a classification distinguishing between temporary part-time teachers and other teachers does not utilize any suspect criteria on its face and no disparate impact on any suspect class is alleged.

Petitioner seems to contend that tenure itself is a fundamental right requiring the application of strict scrutiny to any classification which denies tenure to some individuals and not to others. This is simply not the case. First of all, this court has specifically held that there is no property interest of constitutional dimension in continued employ-

ment as a teacher unless the individual has tenure or a reasonable expectation of continued employment equivalent to common law tenure. *Board of Regents v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 578, 92 S.Ct. 2701 (1972); *Perry v. Sindermann,* 408 U.S. 593, 602, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972). Such common law tenure has never been held to exist in an institution where some teachers hold tenure under a formal system.[23] Moreover, by definition here the temporary, part-time teachers have no reasonable expectation of continued employment (particularly in the more austere post-Proposition 13 era in California). On the contrary, certainty of continuing employment for its members is one of Petitioner's goals in the instant suit.

Petitioner also claims that the procedural due process protections of notice and hearing upon termination are a fundamental constitutional right denied by § 87482 [13337.5] thus requiring the application of strict scrutiny. As will be discussed more fully below, there are no procedural due process rights unless an individual is deprived of life, liberty or property. This court has held that the hope of continuing employment held by a non-tenured teacher hired on a year to year basis is not an interest in property to which procedural due process applies. *Board of Regents v. Roth, supra.* Due process rights do not exist independently of some property right and the temporary part-time teach-

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[23]In the *Sindermann* case, the college in question had no formal tenure process so that the only "tenure" that could be earned was that accrued over a period of time by reason of the development of a reasonable expectancy of continued employment; in other words, a "common law" or "de facto" tenure. The Ninth Circuit Court of Appeals recently reviewed this very issue and concluded that "... the existence of a formal code governing the granting of tenure precludes a reasonable expectation of continued employment absent extraordinary circumstances." *Haimowitz v. University of Nevada,* 579 F.2d 526, 528 (1978).

ers represented by Petitioner here hold no property interest in continued employment.

### 3. Temporary Part-Time Teachers Do Not Constitute A Class Which Should Be Accorded A Special Standard Of Review Established For Gender Based Classifications

Petitioner attempts to rely upon *Craig v. Boren,* 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451, (1976), reh. den. 429 U.S. 1124, 51 L.Ed.2d 574, 97 S.Ct. 1161 (1977) for the proposition that the list of suspect classifications should be expanded to include temporary part-time teachers or at the very least, that an intermediate standard of review should be applied here. In fact, the reasoning of *Craig v. Boren* precludes any such classification as "temporary part-time teachers" from being considered under any standard higher than rational basis.

In *Boren,* examining a statute which distinguished between males and females, the Court relied upon *Reed v. Reed,* 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251, (1971) and its progeny as controlling the standard applicable to gender classifications. *Craig v. Boren, supra* at 199. The reasoning in *Reed* and *Boren* is that while gender might not rise to the level of presumptive irrationality applied to racial classifications, legislatures may not rationally classify individuals based upon assumptions as to the qualities attributable to a particular gender. The decision in *Frontiero v. Richardson,* 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764, (1973), also relied upon by the court in *Boren* rationalized the higher standard applicable to gender classifications by outlining the "long and unfortunate history of sex dis-

crimination" resulting in "gross, stereotyped distinctions between the sexes" and pointing out that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . ." *Frontiero v. Richardson, supra,* at 684-686.

*Boren* refers to gender distinctions as being "archaic . . . over broad . . . outdated misconceptions" and "(i)n light of the weak congruence between gender and the characteristic or trait that gender purported to represent" the court found the distinction violated the equal protection clause. *Craig v. Boren, supra* at 199. Temporary part-time teachers have not been the victim of historical discrimination nor are the individuals subject to outdated or unfair stereotypes. There is no basis for claiming that the unique intermediate status occupied by gender based classification should be extended to include temporary part-time teachers. Petitioner here cannot establish any basis for the application of a strict scrutiny standard. The proper analysis of the statutory scheme in question is therefore under the minimal rational basis test.

### 4. The Statutory System Here Need Only Meet The Rational Basis Test

The equal protection case conceptually closest to Petitioner's contentions in the case at bench is *Massachusetts v. Murgia, supra.* In *Murgia,* challenge was brought to a state statutory scheme providing for mandatory retirement of police officers upon their 50th birthday. The Court found it unnecessary to apply a strict scrutiny test citing *San Antonio Independent School District v. Rodrigues, supra,* for

the proposition that equal protection analysis requires strict scrutiny only where the classification interferes with the exercise of a fundamental right or operates to disadvantage a particular suspect class. The Court stated flatly that "[t]his Court's decisions give no support to the proposition that a right of government employment per se is fundamental. [Citations omitted]. Accordingly, we have expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities'." *Massachusetts v. Murgia, supra* at 313.

The Court went on to find that individuals over 50 do not qualify as a suspect to class reasoning that "[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment, or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Id.* For the same reasons here, Petitioners have no fundamental constitutional right to a particular job classification, tenure, or pro rata pay. Likewise, persons classified by the number of hours they work, even more than those classified by age, do not fit the traditional criteria for a suspect classification.

The court in *Murgia* then examined the statutory system under the rational basis standard. Petitioner here has alleged that there is a low degree of correlation between the alleged purpose of statute and the legislative distinction drawn. It claims that the "fit" is not close enough and

that this classification is over broad in that it includes some teachers who work year after year in addition to truly temporary employees. Under the rational basis test properly applicable to this statutory scheme, there is no requirement for a close fit between the classification and the statutory purpose. *Murgia* correctly set forth the standards upon which state statutory employment classifications should be judged:

> "We turn then to examine this state classification under the rational-basis standard. This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. *Dandridge v. Williams,* [397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970)]. Such action by a legislature is presumed to be valid. [Fn. om.]
>
> * * *
>
> "[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' *Dandridge v. Williams,* 397 U.S. at 485. . . ." (427 U.S. at 314-316).

Applying the rational basis standard, even accepting, *arguendo,* Petitioner's contentions regarding the percentage of temporary part-time teachers in the District who are actually non-permanent this minimal standard is clearly met.

**B. The Statutory Provision In Question Bears A Rational Relation To A Permissible Legislative Objective**

Justice Clark in his concurring opinion[24] in the California Supreme Court succinctly sets forth the legislative purposes behind § 87482 [13337.5] and the way in which those purposes relate to the classification of employees as temporary or permanent. He points out that the Legislature has authorized several different types of temporary instructor assignments, each subject to its own limitations and procedures for employee advancement to contract status. In the fourth paragraph of § 87482 [13337.5] the California Legislature authorized a particular type of temporary status with but a single limitation. As long as the individual teacher does not exceed the 60 percent limitation the temporary nature of the assignment continues indefinitely. Justice Clark set forth the nature of the important governmental purposes to be served by the statutory scheme as follows:

> "The flexibility provided by such assignments is essential if community colleges are to keep up with the changing needs of their clientele. As found by the trial court in the instant case: 'The District finds it necessary to change course offerings constantly in response to such factors as the general economy. Within the confines of a single school year, it may be necessary to add and delete courses by reason of such changing community demand. The California layoff statutes . . . are inadequate to make these adjustments because such proceedings . . . occur at a time when it is not possible to foresee the specific changes in demand which will occur during the following school year.'

[24]Justice Clark filed a concurring and dissenting opinion. The portions of his opinion cited in this Brief are from the concurring portion thereof.

> "The district has drawn a convincing picture of staff and program inflexibility that would be created by conferring tenure upon large numbers of part-time instructors. Their required annual reemployment would inflexibly commit a large portion of the district's scarce salary funds. The district would then find it difficult or impossible to shift funds to new, higher demand courses." 24 Cal.3d at 390 [fn. 6] (Appendix to Petition, p. 31).

Justice Clark's concurring opinion clearly states the legislative purpose behind § 87482 [13337.5]. Given this purpose, the legislative distinction between part-time teachers under the 60 percent limitation and those over it unquestionably meets the rational basis test. Petitioner even admits that "many of them are, in fact, genuine temporaries, with no settled and reasonable expectation of continuity of employment . . . there are those who we might call 'true temporaries'—those whom the districts have only recently hired and whose employment the districts have no current intent to continue beyond a semester or two." (Petition, p. 15.) Given the standards outlined above for rational basis, the fact that a substantial number of those in the challenged classification are the so-called true temporaries is sufficient to meet the applicable constitutional standards even if some other individuals were also included.

### C. Procedural Due Process Rights Are Not Affected By The Statutory Scheme

Petitioner admits that the requirements of procedural due process are not at issue here as none of the Petitioners has lost his or her employment. However, Petitioner apparently contends that should the district decide not to

rehire a temporary teacher, due process would require giving notice and hearing. This is clearly not the case.

This court has considered precisely this issue in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701, (1972). The *Roth* case involved the due process requirement applicable to a non-tenured teacher employed for a fixed term of one year and not rehired for the next academic year. The court held that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. . . . [T]he range of interests projected by procedural due process is not infinite." *Board of Regents v. Roth, supra* at 569-570.

The Court went on to hold that if an expectation of employment is to rise to the level of a property interest, the employee must have "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement" which must "stem from an independent source such as state law." *Board of Regents v. Roth, supra* at 577. The court found that in the absence of tenure, a teacher does not have a property interest sufficient to require notice and hearing such as due process would require for tenured professors.

The teacher in *Roth* had pointed out that most of the year-to-year untenured teachers were rehired and, like Petitioner here, had attempted to argue that the *Perry v. Sindermann, supra,* decision requires a due process hearing under such circumstances. The court completely discounted this argument finding that nothing approaching "common law" tenure system exists for teachers in such a posi-

tion. (See, *Board of Regents v. Roth, supra,* at 578 [fn. 16]). Thus, Petitioner's argument that *Perry v. Sindermann* creates some universal constitutional right to the statutory due process hearing provision afforded tenured teachers is without merit. Temporary part-time teachers, far from having a settled legitimate claim of entitlement, have not even a reasonable expectation of continued employment. In fact, obtaining a settled expectation of continued employment for its members is one of Petitioner's basic goals in bringing this suit. (Petition, p. 14.)

Thus, temporary part-time teachers represented by Petitioner have no due process rights at stake at all insofar as none of them have at risk the loss of any liberty or property interest. Petitioner's apparent reasoning that temporary part-time teachers cannot constitutionally be denied a desired property interest (tenure) because, if they were given such an interest, constitutional due process rights would attach, is blatant bootstrapping and logically unsound. Moreover, such a line of reasoning could be applied to any property interest an individual might wish to gain. As the court said in *Roth:* ". . . Procedural protection of property is a safeguard of the security of interests that a person has *already* acquired in specific benefits." 408 U.S. at 576 [emphasis added]. Temporary part-time teachers have no independent due process rights in the absence of recognized property rights to continued employment. Since by definition temporary teachers have no legitimate claim of entitlement from any source to continued employment, the due process clause is in no way violated by excluding them from the statutory provisions regarding notice and hearing upon termination.

**D. The Statutory Provisions In Question Do Not Violate The Requirements Of Substantive Due Process Since No Fundamental Right Is Limited**

Although Petitioner has not made any specific allegation that substantive due process is violated by this statutory scheme, it has relied upon substantive due process cases for the proposition that fundamental constitutional rights are involved here, thereby requiring additional statutory protection (Petition, p. 17). Petitioner specifically quotes language concerning the definition of a fundamental right from *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603, 17 L.Ed.2d 629, 87 S.Ct. 675, (1967). In *Keyishian*, the court was considering a New York statute making membership in the Communist party prima facie evidence for disqualification of teachers. The Court found portions of the statute void for vagueness and held that public employment may not be conditioned upon the surrender of constitutional rights. Obviously, the reasoning of *Keyishian* has little application of the instant case, for this statute in no way limits the teachers in the exercise of their constitutional rights.

The rights which the Court has recognized as fundamental are those having a value so essential to individual liberty in our society that they justify the Court's close review of the acts of other branches of government. *City of New Orleans v. Dukes,* 427 U.S. 297, 49 L.Ed.2d 511, 96 S.Ct. 2513 (1976). When the government seeks to deprive persons of fundamental rights, it must prove to the court that the law is necessary to promote a compelling and overriding

interest. Where no such right is restricted, the law need only rationally relate to any legitimate state purpose. *Dukes, supra*, at 303.

The statutory scheme in question in no way involves any limitation on the exercise of any fundamental rights. Moreover, Petitioner has not alleged that the statutory scheme has been applied in such a way as to abridge any of its members' fundamental rights. This being the case, the Court should defer to the California Legislature in making its statutory determination. As this Court stated in *City of New Orleans v. Dukes, supra* at 303:

> ". . . [T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines [citation] . . . ."

Likewise, in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-8, 99 L.Ed. 563, 75 S.Ct. 461 (1955), Justice Douglas wrote:

> "The Oklahoma law may exact a needless wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . .
>
> ". . . We emphasize again what Chief Justice Waite said in *Munn v. State of Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77, 87 [1877]: 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.' "[25]

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[25] (*Williamson* was relied upon for this proposition in *Usery v. Turner Elkhorn Mining*, 428 U.S. 1, 49 L.Ed.2d 752, 96 S.Ct. 2882, (1975).)

Since Petitioner has not established that the statutory scheme in any way limits temporary part-time teachers in the exercise of any fundamental rights, only the rational basis standard is applicable here. As demonstrated in the discussion of the equal protection clause (sections A and B, *supra*) this legislation clearly meets the minimal standard.

Petitioner attempts to raise the spectre of a chilling effect upon free speech by alleging the possibility of arbitrary or retaliatory dismissal. However, there are no allegations that any such dismissal has taken place.[26] The teacher in *Board of Regents v. Roth, supra,* raised an identical argument which was accepted by the Court of Appeals and specifically overturned by this Court. The Court stated in footnote 14:

> ". . . The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reason were required here 'as a *prophylactic* against nonretention decisions improperly motivated by exercise of protected rights.' [citation] (emphasis supplied). While the Court of Appeals recognized the lack of finding that respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made 'with a background of controversy and unwelcome expressions of opinion.' . . .
>
> "When a State would directly impinge upon interests in free speech or free press, this court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive

[26]Nor is there an allegation of actual inhibition of free speech rights.

> First Amendment standards . . . . [¶] In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's right of free speech, the interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest." (408 U.S. at 575.)

Petitioner has not alleged any specific conduct in which its members wish to engage that has a substantial certainty of resulting in adverse consequences under the statutory scheme in question. As free speech is not limited by the statutes either on their face or as applied, and in light of the *Roth* decision concerning due process requirements, the need for a prophylactic against possible free speech infringement is highly speculative at best. Petitioner's attempt to raise free speech as an issue obviously fails.

As established above, neither continued government employment nor tenure is a fundamental right. In the absence of tenure, temporary part-time employees simply have no due process right to be included under any statutory notice and hearing provisions. No right to free speech is affected in any way by the statutory scheme either on its face or as applied. Moreover, the classification of temporary part-time teachers based on the 60 percent or less statutory limit does not involve any suspect criteria. Thus, Petitioner's dissatisfaction with the classifications, provisions and implications of the statutory scheme centered on § 87482 [13337.5] is not of constitutional magnitude and need not be addressed by this Court.

## CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 31, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-550



PERALTA FEDERATION OF TEACHERS, LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, et al.,

Petitioners,

vs.

PERALTA COMMUNITY COLLEGE DISTRICT, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

# REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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# REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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## SUMMARY OF ARGUMENT

Respondent (hereinafter the "District"), has devoted sixteen pages of its Brief in Opposition (hereinafter "Opposition Brief") to the proposition that this Court does not have jurisdiction under 28 U.S.C. § 1257 (3). The District asserts that Petitioners (hereinafter the "Teachers") waived the constitutional issues asserted here. The District has pursued this proposition energetically but in a manner that obscures the real issues.

Admittedly, the Teachers treated the issue very concisely in the Petition for Writ of Certiorari (hereinafter "Petition"). But we did clearly state the factual predicates of jurisdiction and we did identify without ambiguity the determinative principle of California law. Instead of squarely facing these points, the District has chosen to try to distract the Court with an irrelevant mass of truisms of California law 1/ and with demonstrably false propositions of United States constitutional law. 2/

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1/ E.g., that "a Rehearing Will Not Be Granted on Points Newly Raised." Opposition Brief, p. 22. The Teachers have never denied this and have expressly predicated preservation of the constitutional issues on a different principle.

2/ E.g., "This Court Has No Jurisdiction to Decide Federal Constitutional Issues Which Were Not Raised and Decided in the California Appellate Courts." Opposition Brief, p. 24 (emphasis added). Obviously, the failure of a (footnote continued)

Curiously, the District fails to address the critical point of California law stated in the Petition, viz., that raising a constitutional issue in a Brief before the California Court of Appeal is sufficient to preserve that issue for consideration by the California Supreme Court. Petition, p. 11.

Rather than deal with the District's collection of points ad seriatim, the Teachers will focus this Reply on the following propositions:

First, the Teachers raised their Equal Protection objection to classifying long-term part-time employees as "temporaries" without rights in their initial presentation to the California Court of Appeal, the "Opening Brief of Cross-Appellants and Reply Brief of Respondents" (hereinafter "Opening Brief of Cross-Appellants").

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2/ (continued from page 1) California Court to expressly address an issue cannot preclude this Court from review if the issue was raised. Chambers v. Mississippi, 410 U.S. 284, 290 n. 3 (1973) ("[D]espite the State Supreme Court's failure to address the constitutional issue, it is clear that Chambers' asserted denial of due process is properly before us.").

Second, as a matter of California law, presentation of the issue in that manner in that forum was sufficient to preserve the issue for the consideration of the California Supreme Court.

Third, at no time did the Teachers affirmatively disclaim the constitutional issue.

These three points are sufficient to demonstrate that this Court has jurisdiction over the Equal Protection questions presented.

For the most part, the Teachers are content to rest upon their statement of the constitutional questions in their Petition, and have little to add here. But since the District has chosen to so confuse matters in its Brief, it may be useful for the Teachers to briefly bring the real Equal Protection issues back into focus.

## ARGUMENT

### I. THE COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257 (3) BECAUSE THE TEACHERS PRESERVED THE CONSTITUTIONAL ISSUES IN A MANNER PRESCRIBED BY CALIFORNIA LAW

#### A. The Teachers' Equal Protection Argument Was Raised in a Timely Manner Before the California Court of Appeal

## 1. Background.

The relationship between two interests asserted by the Teachers in this litigation has been a source of some confusion. The part-time teachers sought both to be granted equal access to tenure and to receive equal pay with full-time teachers (i.e., to be paid on a pro rata basis). The District's practices, pursuant to California law, has denied them both.

Because the Teachers considered that they had both statutory and constitutional bases for each of these interests, they pressed all of these claims in the Trial Court. At the conclusion of the Trial Court's consideration of the case, however, they had prevailed--strictly on statutory grounds--on the tenure claim, but had lost on their pro rata pay claim. (The Superior Court's Findings of Fact and Conclusions of Law are reproduced in the Appendix to Petition for Writ of Certiorari (hereinafter "Appendix"), pp.67-75, 77; see also the Judgment, Appendix p. 62.)

Because divergent results on these two related issues seemed anomolous to the Teachers--and because they had prevailed on statutory grounds on the tenure issue at the Trial level--the Teachers, in the Court of Appeal, emphasized the pro rata pay discrimination and the relationship between tenure and pay.

As the District states and quotes (Opposition Brief at 16-17), the Teachers did argue in the Opening Brief of Cross-Respondents, that, given the

finding of tenure, pro rata pay was statutorily and constitutionally compelled. The Teachers did not rest their claim to tenure exclusively on statutory grounds.

2. The Teachers presented a clear, constitutionally-based claim to tenure.

In a passage from the Teachers' Opening Brief of Cross-Appellants before the Court of Appeal (quoted in the Petition, p. 11), the Teachers expressly stated that discriminating against part-time teachers in terms of "classifications, employment security and other terms and conditions of employment", as well as pay, was irrational and therefore violated both State and Federal Constitutions. In more abbreviated form, we quote that same passage from that Court of Appeal brief here:

> The test for determining the validity of a statute under state law is substantially the same as under the equal protection clause of the Federal Constitution....Stated another way, [under] the Fourteenth Amendment...[,] creating classes or groups and treating them differently must be based on rational distinctions....
>
> ....
>
> The District's singling out part-time persons for inferior treatment in terms of pay, classification, employment security and other terms and conditions of employment...is... irrational.

Opening Brief of Cross-Appellants, pp. 36-37 (emphasis added).

B. The Teachers' Equal Protection Argument Was Properly Before the California Supreme Court Because, as a Matter of California Law, Briefs to the Court of Appeal Are Part of the Legal Argument Before the California Supreme Court Whenever That Court Grants a Hearing.

California's Supreme Court, its Court of last resort, like this Court, has an essentially discretionary appellate caseload. Aggrieved parties have an appeal of right to the intermediate Court, the California Court of Appeal, but the California Supreme Court largely selects its own caseload on the basis of the importance of the issues.3/

When the California Supreme Court accepts a case for review (a procedure referred to in California as "transferring" the case to the Supreme Court, see generally 5 Cal.Jur. 3d, Appellate Review, § 427), all the decisions and orders of the Court of Appeal--but not the record or the briefs before it--are nullified.

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3/California's Rules of Court provide in relevant part: Rule 29. Grounds for Hearing in Supreme Court. (a) [Grounds] A hearing in the Supreme Court after decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction (footnote continued)

Krouse v. Nimocks, 8 C.2d 482, 483, 66 P. 2d 438 (1937). As the respected and oft-cited California authority Witkin has stated: "The case is then 'at large,' i.e., to be decided on the entire record and all the issues, as if originally appealed to the Supreme Court, regardless of the ground relied upon in granting the hearing." Witkin, California Procedure, 2d Ed. (1971), Appeal § 617. Accord 5 Cal. Jr. 3d, Appellate Review § 434.

Consistent with these principles, the California Supreme Court--unlike this Court--has no procedure for the parties to routinely file additional briefs after the case has been transferred. Rather, the California Rules of Court merely provide that the papers filed in the Court of Appeal action, including "the original record, briefs, and all original papers and exhibits on file in the cause", are retained by the California Supreme Court and given the new number of a Supreme Court case. Rule 28(b); Witkin, supra, § 613. The only other procedure, specified in the Rules of Court, governing matters to occur after the hearing is granted, is section (f) of Rule 28: "When a hearing is granted, the cause shall be placed on the calendar for oral argument, unless oral argument is waived."

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3/ (continued from page 6) of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

Of course, as a practical matter, there is a great deal of overlap between an argument which addresses the reasons for granting a hearing, and one which deals with the merits. But as a matter of law, the Petition for Hearing is required to be addressed to the reasons for granting the hearing, and not specifically to the merits. See 8 California Practice (1968), Appeals, § 61:392. And the failure of California's procedure to provide for additional briefs once the case is accepted by the Supreme Court is not prejudicial precisely because the Court of Appeal briefs are themselves considered to be before the Supreme Court once a petition is granted. Thus, the fact that the constitutional issue raised in the Teachers' California Court of Appeal briefs were properly preserved follows from the basic procedural structure of California appellate law.

The conclusion that the Teachers did not waive their constitutional objections does not rest only on inferences from the general practices of California appellate procedure or upon the opinion of scholarly authorities. The issue has been squarely faced by the California Supreme Court and resolved most recently in Menchaca v. Helms Bakeries, Inc., 68 Cal.2d 535, 67 Cal.Rptr. 775, 439 P.2d 903 (1968).

The Court, speaking through Mr. Justice Trobiner, held as follows:

> Although plaintiffs did not raise the issue of negligent equipage in their petition for

> hearing, the question was briefed by both parties and may be reviewed by this court. An order granting a petition for hearing transfers the entire cause here, and the case is then to be decided on all issues, as if originally appealed to this court, regardless of the grounds relied on in the petition.
>
> 68 Cal.2d at 541 n. 1, 67 Cal.Rptr. at 779 n. 1, 439 P.2d at 907 n. 1. (citations omitted.)

In accord with the practice noted above of not requiring "briefs" apart from the petition for hearing in the California Supreme Court, it is obvious that the place where the issue was "briefed" was in the Court of Appeal. In his parenthetical reference to the holding of Menchaca, Witkin confirms this: "plaintiffs did not raise issue in their petition for hearing but had briefed it in court of appeal; issue decided by Supreme Court". Witkin, California Procedure, 2d Ed., Appeal, § 617

The Teachers' research has uncovered no case that alters or modifies the principles represented by these authorities. It follows, therefore, that when the Teachers asked the California Supreme Court for a rehearing limited to the constitutional issues raised here, that court was not asked to decide an issue raised for the first time on appeal. The California Supreme Court clearly could have granted the rehearing consistent

with Menchaca, and apparently declined to do so because it regarded the constitutional claims as non-meritorious. The conclusion is inescapable that Petitioners' federal Equal Protection tenure and pay claims were properly before the California Supreme Court and are properly before this Court.

### C. The Teachers Did Not Affirmatively Disclaim the Constitutional Issue Raised Here

Given the considerations stated above, there is only one way in which the California Supreme Court could have been foreclosed from considering the constitutional tenure issue raised here. If the Teachers had expressly relinquished the issue after having raised it in the Opening Brief of Cross-Appellants, then the issue could have been deemed waived from consideration by the California Supreme Court.

The District so argues: "[T]he plaintiffs affirmatively disclaimed the claim which they now seek to assert." Opposition Brief, p. 18.

The District asserts that this was done in one document and one document alone: The Closing Brief of Cross-Appellants to the California Court of Appeal. Opposition Brief, pp. 18-20.

The District's contention is remarkable on a number of grounds. None of the statements quoted in the District's Opposition Brief at pp. 18-19 represents

an affirmative statement that the tenure claim is not a constitutional one! Rather than these being affirmative disclaimers at all, they are merely statements of the Teachers' statutory arguments.

The District appears to rely on its familiar non sequitur: Because the Teachers argued below for tenure on statutory grounds, they must have argued for it only on statutory grounds. A closer look, however, confirms that there was no disclaimer even by negative implication.

Even without examining the context out of which the quotations supposedly evidencing "affirmative disclaimer" were taken, it is clear that they imply nothing whatever about whether the Teachers' rights to tenure rests exclusively on statutory grounds, or on both constitutional and statutory grounds. The District contends that

> the plaintiffs framed the issue for the California Court of Appeal in such a manner as to abandon any claim that a person properly classified as temporary would be entitled to pro rata pay. Their assertion of a right to pro rata pay has always been conditioned upon their claimed status as non-temporary employees. When the California Court of Appeal found that part-time teachers...are temporary employees, no further issue, constitutional or otherwise, was before that Court with regard to such employees' entitlement to pro rata pay....

> Opposition Brief, p. 19 (emphasis added).

However, conceding for the sake of argument that any person properly classified as temporary would not be entitled to pro rata pay, and that the Teachers' claim to such pay is conditioned on their claim to non-temporary status, the Teachers' expressly claimed that such status is constitutionally required and that therefore they were not properly classified as temporary. The issue here is not whether a constitutional claim remained after the Court of Appeal found that part-time teachers are temporary; the issue is whether, consonent with the Fourteenth Amendment, the Court of Appeal could find them to be temporaries without rights to employment security and equal pay. Since the District in no way indicates how the quoted passages disclaimed (affirmatively or otherwise) this issue the central one raised in this petition for writ of certiorari, we fail to see how the waiver-by-disclaimer took place.

An understanding of the different postures of the Teachers' different claims before the Court of Appeal may make even clearer why no inference may be drawn from the "Closing Brief of Cross-Appellants" that any tenure-related issue was being abandoned.

As pointed out above, (p. 4 of this brief), the Teachers prevailed on the tenured status issue in the trial court and lost on the pro rata pay issue. The District appealed on the tenure issue,

and the Teachers cross-appealed on the pro rata pay issue.

Thus, in the Court of Appeal, the Teachers were Respondents on tenure issue and Cross-Appellants on the pay issue. Their initial brief which followed the District's first appellate brief, was accordingly titled "Opening Brief of Cross-Appellants and Reply Brief of Respondents." (This brief has been referred to here, for the sake of convenience, simply as the "Opening Brief of Cross-Appellants".) Such a combined brief was the appropriate vehicle for the Teachers both to defend the trial court's holding on tenure and to attack its holding on pay, and it was within this brief (at p. 11) that the teachers asserted their constitutional right to tenure.

The document was answered by a brief by the District titled "Appellant's Closing Brief and Reply Brief of Cross-Respondents." In this brief, the District made its final comments on the tenure issue that it had raised in the appeal (in its role as Appellant), and (in its role as Cross-Respondent) made its initial and sole comments on the pro rata pay issue.

This brief, in turn, was followed by the last brief prior to the Court of Appeal decision, the Teachers' "Closing Brief of Cross-Appellants". In it, the Teachers addressed only the pro rata pay issue. According to the California Rules of Court, a cross-appellant is allowed the last word before decision, but its remarks must be limited to the subjects

it raised in the cross-appeal. 4/

In other words, since the subject of the cross-appeal was only equal pay, California law forbid the teachers from raising any further argument on their right to tenure because that was not the subject of the cross-appeal. If the quotations adduced by the District in its "affirmative disclaimer" argument focused any issue at all, it could only have been with respect to the pay issue because the teachers could not discuss the tenure issue.

What the District claims to have been an affirmative disclaimer of the constitutional tenure claim thus represents nothing more than adherence to the elementary procedures of California appellate law.

It would be a peculiar rule, indeed, that required petitioners for certiorari to violate California's judicial procedures in order to preserve their constitutional challenge. Thus the teachers could not, and did not, disclaim their rights under California law to have the California Supreme Court consider the case "at large", including their constitutional claim to tenure.

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4/ California Rules of Court, Rule 14. Additional Briefs...(c) [Briefs on cross-appeal] When a cross-appeal is taken pursuant to rule 3, the respondent, as cross-appellant, need not file a separate brief on the cross-appeal but may include, in a separate section of his reply brief, the points he desires to raise (footnote continued)

D. The California Supreme Court's Failure to Comment on an Issue Properly Before It Does Not Preclude This Court From a Rightful Assertion of Jurisdiction Over the Constitutional Issue

The District states: "This Court Has No Jurisdiction to Decide Federal Constitutional Issues Which Were Not Raised and Decided in the California Appellate Courts." Opposition Brief, p. 24 (emphasis added). Depending on what the District means by "decided", this statement is either irrelevant or erroneous.

If by "decided" the District means only that the particular resolution of the issue was logically necessary to the action taken by the California appellate courts, then a finding of constitutionality was certainly implicit in the decisions of the California courts. As explained above, an Equal Protection Clause argument on the right to tenured status was before both California appellate courts, and they enforced an interpretation of the statute inconsistent with that claim. To do so necessarily rejected the constitutional claim.

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4/(continued from page 14) on his cross-appeal.

The appellant, as cross-respondent, may reply thereto in a separate section of his reply brief, and the cross-appellant may file a reply brief confined to points on his cross-appeal. (Emphasis added.)

If, on the other hand, the District means that the state court must expressly decide the issue, this is obviously wrong. Were it not so, any state court could immunize its decisions from the review of this Court by the simple expedient of refusing to discuss a federal constitutional issue raised by the parties. The impotence of state courts to so negate the Constitution of the United States has been recognized on a number of occasions. Chambers v. Mississippi, 419 U.S. 284, 290 n. 3 (1973) (see quotation, supra this brief n. 1); Street v. New York, 394 U.S. 576, 581-82 (1969).

## II. THE PETITION PRESENTS SUBSTANTIAL CONSTITUTIONAL ISSUES CONCERNING THE STANDARD OF REVIEW TO BE APPLIED TO A CLASSIFICATION THAT BEARS ON DUE PROCESS RIGHTS AND ACADEMIC FREEDOM AND THE REASONABLENESS OF THE CLASSIFICATION

### A. A Classification That Permits State Agencies to Foreclose Some College Teachers From Ever Being Accorded Due Process Rights Must Be Substantially Related to Important Governmental Objectives

In light of the District's comments on the Teachers' constitutional arguments, it may be useful to sharpen the issues, by pointing out what is not involved in this Petition for Certiorari.

First, the Teachers do not argue that part-time college teachers--let

alone "temporary" ones--are a suspect classification, requiring that any legislation affecting them must be necessary to achieving a compelling state interest.

Second, the Teachers do not argue that the right of government employees to tenure is a fundamental right, such that classifications affecting it require a similar level of strict scrutiny.

Third, the Teachers do not argue that any of them has been directly denied Due Process of Law or Freedom of Speech.

Finally, the Teachers do not argue that classifications affecting such teachers must be subject to an intermediate level of scrutiny because the category of "temporary part-time teachers" can, in some way, be likened to gender classifications.

The Teachers have argued that the values they seek to protect fall within the penumbras of the Due Process Clause and the First Amendment; that these values occupy a preferred position compared with mere economic interests; and that therefore when a state classifies teachers in such a way that some are accorded rights related to these values and others are denied such rights, the classification must be substantially related to important governmental objectives.

The Teachers may or may not have a constitutional right to due process

before being terminated. 5/ The fact that the question is open to serious dispute suggests, however, that the rights of these teachers may at least approach constitutional dimensions. Moreover, tenure rights of college teachers--whether statutory or constitutional--clearly protect academic freedom, which this Court has said is "a special concern of the First Amendment", Keyishian v. Board of Regents of New York, 385 U.S. 589, 603, (1967).

These interests, whether constitutionally protected or not, are sufficiently important that when a state chooses to accord such rights and protections to some employees, its decision not to accord them to others must be subject to more than rational basis scrutiny. For another example of this Court holding that statutory rights, not themselves guaranteed by the Constitution of the United States, must be allocated in accordance with the Equal Protection Clause, see Griffin v. Illinois, 351 U.S. 12, 18 (1956)

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5/ The case cited by the District, Opposition Brief, p.33 n.23, in opposition to such a right, Haimowitz v. University of Nevada, 579 F.2d 526 (9th Cir. 1978), may or may not support their position, depending on what constitutes "extraordinary circumstances". For example, the existence of an actual policy on the part of the District, as found in Balen v. Peralta Junior College District, 11 Cal.3d 821, 830, 114 Cal. Rptr. 589, 523 P.2d 629 (1974), of routinely terminating part-time teachers with the actual expectation of repeatedly re-hiring them, creates a constitutionally-protected expectation even under Haimowitz. Furthermore, Johnson v. Fraley, 470 F.2d 179, 181 (4th Cir. 1972) (footnote continued)

(no constitutional right to appeal criminal conviction, but if right given, by state law, may not effectively deny on grounds of indigence).

The appropriate standard of review in the instant case is the one used in the gender cases, not because the Teachers belong to a group which can be likened to women, but because the values at stake here are such that their denial calls for more than rational basis review. See also Trimble v. Gordon, 430 U.S. 762, 767 (1976) (scrutiny of classifications involving illegitimacy "is not a toothless one").

This Court ought to decide what standard of review is warranted by the interests involved in this dispute.

B. The Denial of Tenurial Rights to All Part-Time Teachers is Irrational and Arbitrary, and a Denial of Equal Protection of the Laws, Even When Mediated by the Word-Magic of Calling Them "Temporary"

The statute at issue here requires local community colleges to classify part-time faculty as "temporaries", without rights, in perpetuity, or at least permits them to do so, regardless of

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5/ (continued from page 18) supports the proposition that "continuous employment over a significant period of time...can amount to the equivalent of tenure." Petition, p. 14. The District has not commented on that case.

the colleges' actual intent to employ these teachers on a permanent basis. 6/

The California Supreme Court found, in Balen v. Peralta Junior College District, supra, that the purposes of the system of teacher classifications were to allocate rights to teachers "with positions of a settled and continuing nature", while allowing the Districts to meet their short-term needs with substitute and temporary teachers. 11 Cal. 3d at 826. (Balen was distinguished, in other respects, by the California Supreme Court in the decision below, but not overruled.)

The District now argues that the need for administrative flexibility requires the ability to discharge teachers without notice. Insofar as this may be a legitimate need, and even assuming for the sake of argument that it is an important one, the Equal Protection Clause requires that

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6/ The District insists that the statute only applies to initial classifications of a person working carrying less than 60% of full load, quoting the California Supreme Court. Opposition Brief, p. 6. Nothing in the statute suggests that persons employed carrying less than 60% of a full load can ever achieve tenure status. And the California Supreme Court said nothing in the statute required ever reclassifying these employees as other than temporary. Appendix, pp. 14-15. In any event, the District has availed itself of the "right" to continue the "initial" classification of "temporary" for as long as ten years, Petition, p.26, so the constitutional issue does in fact exist.

the means for meeting these needs not be arbitrary. As our analogy in the Petition, p. 25, suggests, even a system which excluded teachers with names beginning "A" to "M" from the benefits of tenure would contribute to fulfilling the requirements of administrative flexibility. (And, in fact, probably a substantial proportion of those individuals would be "true temporaries".) But such a classification would not meet the requirements of the Fourteenth Amendment because it would be an arbitrary classification. Not only must there be a reason to believe that a classification will meet the state's legitimate interests, but the classification must do so in a manner that itself is fair. Given the overall needs and multiple purposes of the teacher classification system, denying rights to all part-time teachers (and labelling them as "temporaries") is arbitrary and irrational. Petition, pp. 24-27.

The District has made no effort to explain why, beyond the arbitrary compromise to which the Teachers have drawn attention, Petition, pp. 23-25, it is reasonable to have placed the burden of administrative flexibility on these teachers. Their sole answer appears to be that this Court must defer to the legislature, regardless, evidently, of the arbitrary character of the classification.

## CONCLUSION

For all of the above reasons, as well as those stated in the Petition

for Writ of Certiorari, the Petition should be granted and the Writ should issue.

Respectfully submitted,

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November 19, 1979